Richard Mellow Electrical Contractors Corporation *and* International Brotherhood of Electrical Workers, Local 81. Cases 4–CA–22023, 4–CA–23074, and 4–CA–23148

March 31, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On January 30, 1996, Administrative Law Judge George Aleman issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, the Respondent filed an answering brief, and the General Counsel and the Charging Party filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.[2]

1. Contrary to the judge, we find that the Respondent violated Section 8(a)(1) by requiring applicants for employment to disclose their union affiliation. It is undisputed that, on May 23, 1994,[3] Union President Schrader and union members Kenehan and McIntyre applied for work at the Respondent's office. On entering the premises, they saw a round see-through sticker containing the word "union" with a diagonal slash over it affixed to the glass door leading to the main office.[4] They requested, and received, applications along with a form asking them to state whether they were "currently affiliated with any local unions." All three filled out the applications and the union affiliation forms, on which they identified themselves as union members. The applicants requested and received copies of their applications, after which they left the premises. Although the Respondent was hiring electricians during this period of time, none of these individuals was offered employment. On May 24, the Respondent advised Schrader by letter that, although "in the past, it has *always been* our company policy to include with our employment applications; [sic] a sheet inquiring whether the applicant was affiliated with any unions or not," it would no longer request that information (emphasis added).

That same day, the Regional Director for Region 4 approved an informal settlement agreement in Case 4–CA–22023, resolving allegations that the Respondent had engaged in the following unfair labor practices after the start of a union organizing campaign in 1993: coercively interrogating employees about their union activities; threats to reclassify employees as apprentices, close its shop and reopen under a new name with new employees; creating the impression of surveillance; promising benefits; announcing new benefits; and granting a wage increase to discourage employees from voting for union representation. The settlement agreement included a provision requiring the Respondent to recognize and bargain with the Union as the representative of its electricians.

The judge dismissed the complaint allegation that requiring applicants to disclose their union affiliation violated Section 8(a)(1) on the grounds that it was disposed of by the settlement agreement in Case 4–CA–22023. We disagree. In *Hollywood Roosevelt Hotel Co.,* 235 NLRB 1397 (1978), the Board stated the rule that a settlement agreement "disposes of all issues involving presettlement conduct unless prior violations of the Act were unknown to the General Counsel, not readily discoverable by investigation, or specifically reserved from the settlement by the mutual agreement of the parties."

However, the Respondent did not raise this issue in its pleadings or at the hearing.[5] We find that the settlement agreement bar is in the nature of an affirmative defense, which is waived unless timely asserted by the Respondent. See *Federal Management Co.,* 264 NLRB 107 (1982); and *McKeeson Drug Co.,* 257 NLRB 468 fn. 1 (1981) (10(b) defense waived unless timely raised in

[1] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge discredited applicant Tom Skelly's uncontradicted testimony that, when he applied for a job with the Respondent on May 25, 1994, estimator Dembeski asked him if he was a union member and told him that the Respondent might have a job for him when Skelly stated falsely that he was not. Although we adopt the judge's credibility resolution in this regard, we disavow the judge's reliance on Skelly's having concealed his union membership during the application process as one of the grounds for discrediting his testimony.

The Charging Party also asserts that the judge was biased against it. Thus, the Charging Party notes that the judge, inter alia, discredited virtually all of the General Counsel's witnesses even when their testimony was uncontradicted, while crediting virtually all of the testimony by the Respondent's witnesses, discredited witnesses called by the General Counsel based on minor inconsistencies in their testimony while not discrediting the Respondent's witnesses despite similar inconsistencies, and relied on the Respondent's attorney's experience to support his credibility while discrediting the Charging Party's attorney despite his similar experience in labor relations. We find no evidence of bias on the part of the judge.

[2] The Charging Party has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] Unless otherwise noted, all dates are in 1994.

[4] Hereafter the "No Union" sticker.

[5] The Respondent did assert at the hearing that the settlement agreement barred the introduction of its presettlement statements that it would not engage in good-faith bargaining with the Union. However, the settlement agreement was never raised as a defense to the 8(a)(1) allegation discussed above.

pleadings or at hearing).[6] Because the Respondent had waived the defense by not timely raising it, the judge's dismissal of the allegation on these grounds was error, and we reverse him on this point. Id.[7]

Turning to the merits, we find that the Respondent's requiring applicants to disclose their union membership reasonably tended to interfere with, restrain, or coerce employees in the exercise of rights protected by Section 7 of the Act and that it thereby violated Section 8(a)(1) of the Act. See *Colton Sportswear Mfg. Co.,* 182 NLRB 825, 846 (1970).[8]

2. We also disagree with the judge's conclusion that the Respondent's display of the "No Union" sticker did not violate the Act. As noted above, the sticker was displayed on the door to the Respondent's office area, through which applicants for employment—including the discriminatees in this case—had to pass. We find that applicants for employment could reasonably conclude from this decal that they would not be hired if they were members of a union—a conclusion amply supported by the Respondent's many other unfair labor practices, including its coercive interrogation of applicants concerning their union membership or affiliation as set forth above.[9] Accordingly, we find that the Respondent thereby violated Section 8(a)(1) of the Act.

3. The judge properly found that the Respondent violated Section 8(a)(5) and (1) by unilaterally granting employees a wage increase on July 19, 1994, and by failing and refusing to provide the Union with requested information, namely the addresses and wage rates of unit employees.[10] However, the judge also found that the Respondent took these actions in "a good faith belief that it was acting in a proper manner." We disavow this finding. Even assuming, arguendo, that the Respondent honestly believed that employees' addresses were not disclosable on privacy grounds, the sincerity of its belief is irrelevant to the issues before us. It is well settled that this information is presumptively relevant to a union's role as exclusive collective-bargaining representative. *Deadline Express,* 313 NLRB 1244 (1994). Moreover, an employer may not refuse to disclose relevant requested information solely on the basis of its own internal policies or preferences regarding disclosure. *Bryant & Stratton Business Institute,* 321 NLRB 1007 fn. 4 (1996), enfd. 140 F.3d 169 (2d Cir. 1998).

Likewise, there is no basis for finding that the Respondent acted in good faith in unilaterally granting the wage increase in July 1994, when its granting of a similar wage increase in July 1993 was the subject of the settled complaint in Case 4–CA–22023. In finding that the 1994 wage increase was granted in good faith, the judge ignored the fact that both the announcement of the increase policy and the granting of an increase pursuant to that policy in 1993, were alleged to be unlawful in the complaint, and were resolved by the settlement agreement in which the Respondent promised to refrain from such conduct in the future. Under these circumstances, we fail to see how the judge could reasonably conclude that the Respondent's continued grant of such unilateral wage increases was undertaken in good faith.

4. Contrary to the judge, we find that the Respondent's failure to consider any of the 14 union members who applied for work between May 23 and June 17, despite its hiring 13 other electricians, violated Section 8(a)(3) and (1) of the Act. As set forth below, there is no evidence that the Respondent ever considered any of the 14 discriminatees for any of the vacant positions. We find that the General Counsel has established that antiunion animus was a motivating factor in the Respondent's failure to consider the union members for employment, and that the Respondent has failed to rebut this showing with evidence that it would not have considered them even in the absence of their union membership.

As more fully described in the judge's decision, 14 union adherents applied for work with the Respondent on various dates between May 23 and June 17, in response to help wanted ads placed by the Respondent. It is undisputed that the Respondent was aware, from the beginning, that union adherents were submitting written applications. Not one of these applications was considered or reviewed in any way by the Respondent's president, Richard Mellow, who made all hiring decisions for the Respondent. The judge found that the 13 individuals who were hired by the Respondent all had either previously

[6] The judge's handling of this issue demonstrates the unfairness of allowing a party to raise this issue for the first time in its posthearing brief, as the Respondent did here. Thus, in finding that the allegation was barred by the settlement agreement, the judge stated that there was no "contention being made that the alleged violations were unknown to the General Counsel or were not readily discoverable by an investigation." Because the Respondent never raised the issue in its pleadings or at the hearing, it would have required clairvoyance on the part of the General Counsel to have anticipated a need to make such a contention and introduce evidence pertaining to the issue. We decline to impose this burden on the General Counsel.

[7] In light of this finding, we find it unnecessary to determine whether, if the defense had been timely raised, the allegation would have been barred by the settlement agreement. However, we note that the agreement was executed by the parties prior to May 23. The agreement was approved by the Regional Director on May 24, one day after the Respondent's actions on May 23.

[8] In light of our finding that the Respondent coercively interrogated applicants about their union affiliation, we find it unnecessary to pass on the judge's finding that the Respondent did not coercively interrogate employee Burdick by asking him on June 17 if he still had a union card, since any additional findings of interrogation would be cumulative.

[9] It is well settled that the question of whether an employer's actions reasonably tend to interfere with, restrain, or coerce employees in the exercise of Sec. 7 rights is an objective one, and does not turn on whether the employer's coercion succeeded or failed. See, e.g., *American Freightways Co.,* 124 NLRB 146, 147 (1959). Accordingly, it is irrelevant that, as the Respondent asserts, there is no evidence that any individual in fact was deterred by the "No Union" sticker from applying for a position with the Respondent.

[10] There are no exceptions to these findings.

worked for the Respondent, been referred to Mellow personally, or had previously (i.e., prior to its solicitation of applications in May 1994) expressed an interest in working for the Respondent (presumably by some means other than submitting a written application).[11]

The judge found that the General Counsel did not establish under *Wright Line*[12] that the failure to consider the 14 union applicants was unlawfully motivated, primarily because the judge found that the General Counsel did not establish that Mellow personally knew of each alleged discriminatee's union affiliation. The judge also found no evidence of union animus on the part of the Respondent. The judge further found that, even assuming that a prima facie case had been established, the Respondent had demonstrated that it would not have hired the 14 union applicants even if they had not been affiliated with the Union based on a legitimate, nondiscriminatory policy of preferring prior employees, referrals, or individuals who had by any other means than a written application for employment expressed an interest in working for the Respondent.

Contrary to the judge, we find that the General Counsel established a strong case that the Respondent failed to consider the 14 union applicants because of their union membership or support.[13] The Respondent admits that it never considered the 14 union applicants for the 13 vacancies; it does not contend that they were rejected after a comparison of their qualifications with those hired. Thus, the only issue presented is whether the Respondent's refusal to consider the 14 applications was motivated by their union affiliation. For the reasons that follow, we find that it was.

On May 23, the Respondent's help wanted ad appeared in a local newspaper. That same day, Schrader, Kenehan, and McIntyre applied for work. It is undisputed that Mellow knew that these three individuals were union members and that they had applied for employment with the Respondent. It is also undisputed that the Respondent never considered them for any of its vacant positions in the months that followed.

The General Counsel has established a blatant disparity between the treatment of Schrader, Kenehan, and McIntyre, none of whom was considered or hired, and the 13 individuals whom the Respondent hired, who, with one exception discussed above, had no union affiliation.[14] We find it reasonable to infer that it was not mere coincidence that these three individuals, who were known to Mellow to be union members, were not considered while those who were hired had weak or nonexistent union ties. *Fluor Daniel, Inc.,* 304 NLRB at 971. The Respondent's many unfair labor practices described herein, including its prominent display of the "No Union" sticker on the door to the office where job applications were submitted and its longstanding and admitted policy of requiring all applicants to disclose their union affiliation as part of the application process, clearly demonstrate union animus on its part.[15] Accordingly, we find that the General Counsel has established that the Respondent's refusal to consider these three applicants for employment was motivated by an unlawful desire to avoid hiring union members.

We find for the reasons that follow that the Respondent's failure to consider the applications of the remaining alleged discriminatees was also motivated by antiunion considerations. Thus, the General Counsel has shown that the Respondent, including Mellow personally, was aware that union adherents were submitting written applications, beginning with Schrader's application on May 23. Thereafter, the Respondent refused to

[11] Twelve of the thirteen individuals hired by the Respondent during the period in question had no union affiliation; the remaining applicant was related to a general contractor from whom the Respondent obtained a substantial amount of business and a member of a union in another jurisdiction. We do not regard the Respondent's hiring of the relative of an important customer, who happened to be a member of a union other than the Charging Party, as evidence which would detract from the General Counsel's showing of antiunion motivation. See *Fluor Daniel, Inc.,* 304 NLRB 970, 971 (1991) , enfd. 976 F.2d 744 (11th Cir. 1992) (prima facie case of discrimination established where those hired had weak or nonexistent union ties, those affiliated with union not considered).

[12] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983).

[13] The complaint was amended at the hearing to allege that the Respondent "failed and refused to consider and hire" the 14 union applicants. Of course, failing to consider individuals for employment based on union affiliation also violates Sec. 8(a)(3) and (1). See, e.g. *Ultrasystems Western Constructors,* 310 NLRB 545 (1993), enf. denied other grounds 18 F.3d 251 (4th Cir. 1994), on remand 316 NLRB 1243 (1995).

[14] The 13 individuals hired by the Respondent were hired on the following dates in 1994: May 24, May 29, June 6 (3 hires), June 13 (2 hires), June 14, July 18 (2 hires), July 27, July 28, and August 15.

[15] It is not clear whether the judge considered the Respondent's unlawful disclosure policy before finding no evidence of union animus in this case. The judge did consider whether the policy would support an inference that union affiliation was used as a basis for denying employment to the alleged discriminatees. He found that it did not because there was no evidence that Mellow had read the forms submitted by Schrader and applicants McIntyre and Kenehan. We are puzzled by this finding, as the judge found elsewhere that Mellow knew that these three individuals were union adherents and that they had applied for work with the Respondent. Even more to the point, the Respondent's evident willingness to coercively interrogate applicants concerning their union affiliation is evidence of animus on its part and establishes a strong basis for finding that it would be willing to act on that information by denying them employment. *Cannon Electric Co.,* 151 NLRB 1465, 1468 (1965) (interrogation is a common prelude to discrimination, because an employer cannot discriminate against union adherents without first determining who they are).

In finding union animus we also rely on the stipulated testimony of applicants Kerrigan, Demchak, and Caffrey set forth at fn. 6 of the judge's decision. The judge did not consider this evidence on the grounds that, because they did not testify in person, he had not had an opportunity to assess their credibility. We reverse this finding. Having accepted the stipulated testimony, the judge was not entitled to effectively discredit it based on the absence of an opportunity to observe the individuals' demeanor.

consider *any* written applications for employment in filling its open positions, even though it had solicited, and continued, after May 23, to solicit, such applications through help wanted ads in a local newspaper. At the hearing, the Respondent never offered any business-related reason for why it would prefer to hire individuals who had not submitted written applications but had instead indicated by some other means that they wanted a job. These facts, coupled with the evidence of the Respondent's union animus, warrant an inference that the Respondent's refusal, after May 23, to consider any written applications for employment was motivated by an unlawful desire to avoid hiring union members.[16]

We further find that the Respondent has not established that it would have taken the same actions even if the alleged discriminatees had not been affiliated with the Union. The Respondent asserts that it failed to consider the written applications based on a policy of preferring to hire prior employees, referrals, and individuals that had previously expressed an interest in employment. However, the record wholly fails to substantiate this assertion. We note first that Mellow, the individual responsible for the Respondent's hiring, never testified that he had a policy of giving preference to referrals and individuals who had previously indicated an interest in employment (presumably by some means other than submitting a written application for employment). Rather, Mellow testified only that he did not review the applications of the alleged discriminatees because he "was hiring previous people that had worked for me." The General Counsel established that this explanation was inaccurate, as at least 4 and perhaps as many as 11 of the 13 individuals hired by the Respondent during this period of time had no record of prior employment with the Respondent.[17]

The sole basis for the judge's finding that the Respondent also had a policy of giving preference in hiring to referrals and individuals who had expressed a prior interest in working for the Respondent was Office Manager Kresge's testimony that Mellow told her that he had hired "some other people that he knew of personally that were recommended to him, some other people that he had always wanted to come work for him that were available." The judge credited Kresge's testimony, as evidence that Mellow had a policy of giving preference to such individuals. We note, however, that Kresge's testimony referred only to specific instances of the hiring of employees who had been recommended by others or who had previously expressed interest in working for the Respondent, and does not establish that the Respondent had any general policy in this regard. Further, there is no documentary or other corroborating evidence to support Kresge's testimony. Under these circumstances, and because Mellow alone was responsible for the hiring decisions, we find that Kresge's testimony is entitled to little weight and does not rebut the General Counsel's showing that the Respondent's failure to consider the alleged discriminatees was motivated by their union affiliation.[18]

5. Finally, contrary to the judge, we find that the Respondent violated Section 8(a)(5) by failing to comply with its obligation to bargain with the Union as the exclusive collective-bargaining representative of its employees.

As discussed more fully in the judge's decision, the Respondent agreed to recognize and bargain with the Union as part of the settlement agreement in Case 4–CA–22023, which was approved by the Regional Director on May 24. On June 6, the Union mailed to the Respondent a proposed collective-bargaining agreement and proposed several dates in June for negotiations. The Respondent's negotiator, Attorney David Koff, was not available on any of those dates, so the parties agreed to meet on July 5. At that meeting, which lasted about 1 hour, the parties generally discussed the Union's proposed agreement, the differences between residential and commercial work, and the possibility of the Respondent's agreeing to the Union's standard residential agreement. The Respondent's negotiator, Attorney Koff, stated that he would have to review these matters with Mellow and get back to the Union.

The parties' next meeting was on October 3. In the interim, Mellow and Union Business Manager Flanagan spoke by phone once, on July 12. During that conversation, which was initiated by Flanagan's prior phone call and message, Mellow stated that his sole desire was to be "double-breasted," and that he would sign an agreement

[16] Under the circumstances of this case, the fact that Mellow may not have been personally aware of the union affiliation of all of the individuals who submitted written applications after May 23 does not detract from the General Counsel's showing of antiunion motivation. It is undisputed that Mellow knew that Schrader and other union adherents were submitting applications. His refusal to consider those applications plainly warrants an inference that their union affiliation "was a motivating factor in the employer's decision." *Fluor Daniel, Inc.,* 304 NLRB at 970. In light of Mellow's patent union animus, we find that his refusal to consider any written subsequent applications warrants the same inference.

[17] In response to the General Counsel's subpoena, the Respondent produced at the hearing the applications of only 6 of the 13 individuals hired.

Having concluded that the Respondent's stated reason for its actions is false, we find that the circumstances of this case warrant an inference that its true motivation was an unlawful motive that the Respondent wished to conceal. See *Fluor Daniel,* 304 NLRB at 970; and *Associated Services for the Blind,* 299 NLRB 1150, 1152 (1990).

[18] The General Counsel asserts that the judge should have discredited both Mellow and Kresge in light of their inconsistent testimony concerning the reasons for Mellow's hiring decisions, and observes that the judge consistently discredited his witnesses based on similar inconsistencies. In light of our disposition of this case, we find it unnecessary to pass on this issue. However, we do find that the shifting nature of the Respondent's explanations for its failure to consider the 14 union applicants is further evidence of unlawful motivation. See *NLRB v. Future Ambulette,* 903 F.2d 140 (2d Cir. 1990), enfg. as modified 293 NLRB 884 (1989).

if that were permitted. When Flanagan stated that the Union could not agree to that, Mellow stated he would get back to Flanagan to schedule a meeting but that he did not want Schrader present because he did not care for him.

Mellow did not get back to Flanagan. On July 29, Flanagan called the Respondent again and left a message for Mellow when Office Manager Kresge told Flanagan that Mellow was out. Mellow never returned that call, and the Respondent made no further efforts to communicate with the Union until August 24, when the Respondent sent its first contract proposal to the Union—in response to the Union's August 18 letter requesting a counterproposal to its proposal of July 5 and available dates for a meeting.

When the parties met on October 3, they began by discussing article 18 of the Respondent's proposed contract, a "double-breasting clause" providing that the agreement would not apply to any other entity owned by Mellow even if that entity was engaged in the electrical contracting business, and that Mellow could contract any work to such entities and that such entities would not be bound by the agreement. The Union stated its adamant opposition to the proposed article 18, and the Respondent's negotiators agreed to withdraw it after a caucus. The parties then turned to economic matters, and the meeting ended shortly thereafter.

It is undisputed that the parties never met to negotiate an agreement after October 3. Likewise, it is undisputed that the Union on January 12, 1995, proposed by letter that the parties meet on January 18, 19, or 20, and that the Respondent refused to meet on any of these dates because its attorney was not available. Although not mentioned by the judge, it is also undisputed that the Respondent never offered any other dates on which to meet, despite its January 18, 1995 promise to "get back to you to set up a meeting sometime in the next two weeks."

Although the Respondent agreed to bargain with the Union as part of the settlement agreement approved on May 24, 1994, the evidence establishes that the Respondent has failed to fulfill that obligation. Section 8(d) defines the obligation to bargain collectively to include "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." The obligation to bargain requires both parties to bargain with a "bona fide intent to reach an agreement."[19] As noted above, the Respondent has failed to respond to the Union's requests for meetings on at least three occasions, including a total, undisputed, and unexplained failure to meet after January 1995. At the same time it was failing to respond to the Union's requests to meet, the Respondent also granted unilateral wage increases and refused to provide plainly disclosable information on request by the Union. Viewed against the background of the Respondent's many and serious unfair labor practices and the abundant evidence of its antiunion animus, we find that the Respondent's actions clearly fall far short of its obligation to meet at reasonable times and to bargain with the Union. Accordingly, we find that the Respondent has violated Section 8(a)(5) as alleged in the complaint. See *Nursing Center at Vineland,* 318 NLRB 901, 905 (1995) (employer's negotiator canceled three negotiating sessions because unavailable), enfd. 151 LRRM 2736 (3d Cir. 1996); *Entertech,* 309 NLRB 896, 899 (1992) (unilateral changes in conditions of employment evidence of bad faith); *Barclay Caterers,* 308 NLRB 1025, 1037 (1992) (although union pressed for meetings, employer only agreed to meet four times in 9 months); and *Storer Communications,* 294 NLRB 1056, 1095 (1989) (employer only available to meet on three dates in more than 5 months; union satisfied burden to seek meetings by telling mediator it was available any time).

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(3) and (1) by refusing to consider 14 applicants for employment, we shall order the Respondent to consider them for hire and to make whole those discriminatees whom the Respondent would have hired for the 13 job openings that were filled between May 23 and June 17, 1994, for any losses sustained by reason of the discrimination against them, including amounts they would have earned on other jobs to which the Respondent subsequently would have assigned them.[20] *The 3E Co.,* 322 NLRB 1058 (1997), enfd. mem. 132 F.3d 1482 (D.C. Cir. 1997). If it is shown at the compliance stage of this proceeding that the Respondent, but for the discrimination, would have assigned any of these discriminatees to present jobs, the Respondent shall hire those individuals and place them in positions substantially equivalent to those for which they applied.[21] Furthermore, as for the remaining discriminatee who would not have been hired, if it is shown at the compliance stage that the Respondent

[19] *Atlas Mills,* 3 NLRB 10, 21 (1937).

[20] Although we shall permit the Respondent to introduce evidence, during the compliance proceedings, that these discriminatees would not have been hired after the dates indicated on their application forms in any event, the Respondent shall bear the burden of proving that the employees hired after the application dates of the discriminatees actually had superior qualifications over the discriminatees. *H. B. Zachry Co.,* 319 NLRB 967, 968 (1995), enf. denied in part on other grounds 127 F.3d 1300 (11th Cir. 1997).

[21] Consistent with *Dean General Contractors*, 285 NLRB 573 (1987), liability for subsequent positions may be defeated if it is shown that the Respondent did not transfer employees from project to project.

would have hired the discriminatee to fill job openings that later became available, the Respondent shall also make that individual whole for the discrimination found and place the individual in a position substantially equivalent to that for which the individual applied. Any backpay owed under the terms of this Order shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Additionally, having found that the Respondent has failed to provide the Union with the addresses and rates of pay of unit employees, information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees, we shall order the Respondent to furnish the Union the information requested in its letter dated August 5, 1994. We shall also order the Respondent, if requested by the Union, to rescind the unilateral wage increase granted on July 19, 1994. Nothing in this Order shall be construed to require the Respondent to withdraw any benefit previously granted unless requested by the Union.

ORDER

The National Labor Relations Board orders that the Respondent, Richard Mellow Electrical Contractors Corporation, Dickson City, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employee about union activities or sentiments.

(b) Threatening employees that they will not be considered for employment because of their union membership or affiliation.

(c) Failing and refusing to furnish to the International Brotherhood of Electrical Workers, Local 81 information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

(d) Unilaterally granting wage increases to unit employees without notifying and bargaining with the Union.

(e) Discriminatorily refusing to consider for hire applicants for employment because of their union membership.

(f) Refusing to bargain with International Brotherhood of Electrical Workers, Local 81 as the exclusive bargaining representative of the employees in the appropriate bargaining unit.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish to the Union in a timely fashion the information requested by the Union in its letter dated August 5, 1994.

(b) On request, rescind the wage increase granted on July 19, 1994.

(c) Consider for hire those discriminatees named below whom the Respondent discriminatorily failed to consider for hire and make whole those discriminatees whom the Respondent would have hired for the 13 job openings that existed between May 23 and June 17, 1994, for any losses sustained by reason of the discrimination against them, including amounts they would have earned on other jobs to which the Respondent would have assigned them, as set forth in the remedy section of this decision. If it is shown at the compliance stage of this proceeding that the Respondent, but for the discrimination, would have assigned any of these discriminatees to present jobs, the Respondent shall hire those individuals and place them in positions substantially equivalent to those for which they applied. As for the remaining discriminatee who would not have been hired between May 23 and June 17, 1994, if it is shown at the compliance stage of this proceeding that the Respondent would have hired that discriminatee to a job that became available subsequent to the discriminatee's application, the Respondent shall make the discriminatee whole for the discrimination found in the manner set forth in the remedy section of this decision and place the discriminatee in a position substantially equivalent to that for which the discriminatee applied.

Richard Schrader	William Kenehan
Roger Dowdell	Michael Caffrey
Gerald Trygar	Robert Kerrigan
Ronald Demchak	James Igoe
Charles Henger	Larry Slusher
John McIntyre Sr.	John Campbell
Matthew Dragon	William Gansol

(d) On request, bargain with the Union as the exclusive representative of employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All electricians employed by Richard Mellow Electrical Contractors Corporation, excluding all other employees, estimators, office clerical employees, guards, and supervisors as defined in the Act.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Dickson City, Pennsylvania, copies of the

attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 31, 1994.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate any employee about their union activities or sentiments.

WE WILL NOT threaten employees or applicants for employment that they will not be considered for employment because of their union membership or affiliation.

WE WILL NOT fail and refuse to furnish to the International Brotherhood of Electrical Workers, Local 81 information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

WE WILL NOT unilaterally grant wage increases to unit employees without notifying and bargaining with the Union.

WE WILL NOT discriminatorily refuse to consider for hire applicants for employment because of their union membership.

WE WILL NOT refuse to bargain with International Brotherhood of Electrical Workers, Local 81 as the exclusive bargaining representative of the employees in the appropriate bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL furnish to the Union in a timely fashion the information requested by the Union in its letter dated August 5, 1994.

WE WILL, on request, rescind the unlawful wage increase granted on July 19, 1994.

WE WILL consider for hire those discriminatees named below whom we discriminatorily failed to consider for hire, and WE WILL make whole those discriminatees whom we would have hired for the 13 job openings that existed between May 23 and June 17, 1994, for any losses sustained by reason of the discrimination against them, including amounts they would have earned on other jobs to which we subsequently would have assigned them, with interest. If it is shown at the compliance stage of this proceeding that, but for the discrimination, we would have assigned any of these discriminatees to present jobs, we shall hire those individuals and place them in positions substantially equivalent to those for which they applied. As for the remaining discriminatee who would not have been hired between May 23 and June 17, 1994, if it is shown at the compliance stage of this proceeding that we would have hired that discriminatee to fill job openings that later became available, we shall make the discriminatee whole for the discrimination found, with interest, and place the discriminatee in a position substantially equivalent to that for which the discriminatee applied.

Richard Schrader	William Kenehan
Roger Dowdell	Michael Caffrey
Gerald Trygar	Robert Kerrigan
Ronald Demchak	James Igoe
Charles Henger	Larry Slusher
John McIntyre Sr.	John Campbell
Matthew Dragon	William Gansol

WE WILL, on request, bargain with the Union as the exclusive representative of employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

[22] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

All electricians employed by us, excluding all other employees, estimators, office clerical employees, guards, and supervisors as defined in the Act.

RICHARD MELLOW ELECTRICAL CONTRACTORS CORPORATION

Henry Protas, Esq., for the General Counsel.
Scott Gartley, Esq. (Koff, Wendoloski, Ferguson, & Cordaro), of Wilkes-Barre, Pennsylvania, for the Respondent.
Bernard N. Katz, Esq., of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE ALEMAN, Administrative Law Judge. Pursuant to charges filed by International Brotherhood of Electrical Workers, Local 81 (the Union), the Regional Director for Region 4, on February 14, 1995, issued a consolidated complaint alleging that the Respondent, Richard Mellow Electrical Contractors Corporation, had violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act).[1] The Respondent thereafter timely filed an answer to the complaint on or about March 2, 1995, denying the commission of any unfair labor practices. A hearing on these allegations was held in Scranton, Pennsylvania, on May 24–25, 1995, during which all parties were afforded full opportunity to call and examine witnesses, to submit oral as well as written evidence, and to argue on the record.

The Issues

Specifically, the complaint alleges that the Respondent violated

1. Section 8(a)(1) of the Act by

(a) Displaying an antiunion symbol on its office door.

(b) Requiring job applicants to disclose their union affiliation.

(c) Interrogating employees as to their union membership and regarding conversations had with union officials.

2. Section 8(a)(3) of the Act by

(a) Refusing to hire or to consider for employment 14 applicants because they were they were members of or supported the Union.

3. Section 8(a)(5) of the Act by

(a) Unilaterally granting unit employees a pay raise.

(b) Failing and refusing to furnish the Union with certain requested information.

(c) Failing and refusing to bargain in good faith with the Union.

On the basis of the entire record in this proceeding, including my observation of the demeanor of the witnesses, and having duly and carefully considered briefs filed by counsel for the General Counsel, the Union, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Pennsylvania corporation with an office and place of business in Dickson City, Pennsylvania, is engaged in the business of providing electrical contracting services. During the past year, the Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $500,000. During the same period, it purchased and received at various sites located within the Commonwealth of Pennsylvania goods valued in excess of $50,000 from other enterprises located in Pennsylvania, which enterprises, in turn, received the goods directly from points outside the Commonwealth of Pennsylvania. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It further admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A Background

Since 1977, the Respondent has been owned and operated by Richard Mellow. It has an employee complement consisting of electricians (including journeymen and apprentices), an estimator, Jay Dembeski, an office manager, Cathy Kresge, who functions also as secretary and receptionist, and a truckdriver identified only as Chris.

In late November 1992, the Union began efforts to organize the Respondent's electricians. Union President and Organizer Richard Schraeder initially engaged in "top down" organizing efforts aimed at obtaining voluntary recognition from Mellow. When this proved unsuccessful, the Union, in July 1993, switched tactics and began a "bottoms up" organizing campaign that essentially involved contacting the Respondent's employees directly to obtain their support. Soon thereafter, on August 25, 1993, the Union filed the charge in Case 4–CA–22023 alleging that the Respondent had engaged in certain unlawful conduct designed to thwart its organizational efforts. On May 24, 1994,[2] the Acting Regional Director for Region 4 approved an informal settlement agreement entered into by the parties resolving the issues raised in Case 4–CA–22023. Under the terms of that agreement, the Respondent, inter alia, agreed to recognize and bargain with the Union as the exclusive bargaining representative of its electricians.[3]

On May 23, the Respondent advertised in the Scranton Tribune Times for experienced electricians. Kresge testified, with-

[1] Case 4–CA–22023 was filed August 25, 1993, and amended October 29, 1993; Case 4–CA–23074 was filed August 31, 1994; Case 4–CA–23148 was filed September 27, 1994, and amended October 27, 1994. A complaint in Case 4–CA–22023 issued on October 29, 1993, after which the parties entered into an informal settlement agreement resolving the issues raised therein which was approved by the acting Regional Director on May 24, 1994. On February 14, 1995, the Regional Director issued an order revoking the settlement agreement and consolidating the cases for hearing. However, on April 20, 1995, the Regional Director issued a further order reinstating his approval of the settlement agreement in Case 4–CA–22023, and directing that that case be severed from Cases 4–CA–23074 and 4–CA–23148. (See G.C. Exh. 1(v).) Thus, the allegations in the consolidated complaint relating to Case 4–CA–922023, more particularly, pars. 1, 5–9, 16–18, 22, and parts of pars. 23 and 25, have been withdrawn and are not before me.

[2] All dates hereinafter are in 1994, unless otherwise indicated.

[3] As more appropriately described in the complaint and admitted in the answer, the unit consists of "All full-time and regular part-time electricians employed by Respondent, excluding all other employees, estimators, office clerical employees, guards and supervisors as defined in the Act."

out contradiction, that she was advised by Mellow to place the ad and to maintain applications received in response to the ad on file in the event additional personnel were needed. Between May 24 and August 18, the Respondent hired some 13 individuals, none of which included any of the 14 alleged discriminatees named in the complaint.

1. Facts surrounding the job application process

Schraeder, a named discriminatee, testified that he saw Respondent's "help wanted" ad on May 23, and that he convinced alleged discriminatees William Kenehan and John McIntyre, both unemployed union members, to join him in applying for work with Respondent. Schraeder described his efforts as a "salting" operation.[4] That same day, Schraeder, Kenehan, and McIntyre went to Respondent's office to apply for jobs. Schraeder testified that on entering Respondent's premises, he noticed a round see-through sticker containing the word "UNION" with a diagonal slash over it posted at eye level on the glass door leading to the main office, which he took to be an antiunion symbol.[5] Schraeder, Kenehan, and McIntyre met with Kresge, who gave them applications to fill out, along with a separate form on which they were asked to state whether they were "currently affiliated with any local unions." (See G.C. Exh. 4.) All three filled out applications, along with the union affiliation form identifying themselves as union members, after which they requested, and received, copies of their applications. Kresge advised the employees that Respondent was "taking applications for jobs that we would have coming up" and that "at one point or another [she] would probably be giving the applications to Mr. Mellow and if he was interested he would give them a call." On receiving copies of their application, Schraeder, Kenehan, and McIntyre left the premises. On the following day, Kresge notified Schraeder by letter that Respondent was immediately discontinuing its policy of requesting job applicants to disclose their union affiliation.

In the days that followed, Schraeder continued his "salting" efforts by encouraging other union members to apply for work with Respondent, and asking those who chose not to conceal their union affiliation to obtain copies of their application. The record reflects that at various times on May 24, the Respondent received applications from alleged discriminatees Roger Dowdell, Michael Caffrey, Matthew Dragon, Gerald Trygar, Robert Kerrigan, and John Campbell. None of these individuals was asked to disclose their union affiliation, and none testified at the hearing.[6]

On May 26, alleged discriminatee Ronald Demchak submitted his application for employment. (G.C. Exh. 39.) When he requested a copy of his application, Kresge purportedly stated "she did not want to get in trouble. I don't know what's going on, but I've been told not to give out copies of the applications."[7] James Igoe, another alleged discriminatee, filed his application on May 27. (G.C. Exh. 14.)

The remaining alleged discriminates William Gansel, Charles Henger, and Larry Slusher submitted applications on June 17 on which they expressly identified themselves as "union organizers." (G.C. Exhs. 40ÿ 0942.) Of the three, only Gansel was called to testify. According to his testimony, he, Henger, and Slusher were driven by Schraeder to Respondent's facility to apply for employment. After dropping them off at Respondent's parking lot, Schraeder parked his car across the street from Respondent and waited for them to return. Kresge, according to Gansel, told him after they completed their applications that Respondent was "hiring in the near future and would be putting some people on."

Gansel claims he overheard a conversation that occurred between Mellow and Schraeder after he turned in his application. He testified that on learning that Schraeder was outside his premises Mellow became very upset, complained that Schraeder was "harassing him again," and purportedly went outside to chase him away. Gansel claims he also went outside, observed that Schraeder had pulled up the street, and heard Mellow telling Schraeder he was still on his property. Schraeder, according to Gansel, replied that he was just waiting for his friends who were filling out applications for work, and that Mellow sarcastically responded, "Well, I just might hire them." Gansel states he then approached Mellow, offered to shake his hand, and informed him he would like to work for Mellow and would give "eight hours work for eight hours pay." Mellow, however, responded by refusing to shake his hand and simply jumped in his truck and drove off without saying anything.

Schraeder's version of what occurred is materially different from Gansel's account. Schraeder's testimony is that after he dropped off Gansel, Henger, and Slusher, Mellow drove up in his truck, got out, shook Schraeder's hand, and asked him, "What's the matter? What are you doing?" to which Schraeder replied, "Nothing's the matter." Schraeder told Mellow he had brought in some men to apply for jobs. Mellow then reminded Schraeder of the upcoming bargaining session, and Schraeder responded he was aware of the scheduled meeting and looked

[4] Under the Union's "salting" resolution, union members were allowed to apply for jobs with a nonunion employer with the expectation that once hired, they would help organize other employees, and convince the employer of the quality of their work. Absent a salting agreement, union members were not permitted to work for a nonunion contractor.

[5] Schraeder described the sticker as about 4–6 inches in diameter. Kresge and Dembeski both stated it was approximately 3 inches round. While the size of the sticker is of no consequence here, I credit Kresge and Dembeski that the sticker was approximately 3 inches round.

[6] In lieu of testimony, the parties stipulated as to what some of these individuals would say if called to testify as to the circumstances surrounding the application process. It was stipulated that Kerrigan went to Respondent's office by himself, observed that Dowdell was present, and completed and thereafter requested a copy of his application. Kerrigan presumably would have testified that soon thereafter, Dembeski walked in and asked, "What's going on?" to which Kresge, after handing him Kerrigan's application, responded, "Rich isn't going to like this." The parties stipulated that Caffrey submitted an application on May 24, that he was accompanied by Dragon, that no other applicants were present at the time, that because he and Dragon had had similar work experiences much of the information he included in his application regarding his past work experience came from Dragon, and that he and Dragon both asked for and received copies of their applications. While the Respondent may have stipulated that the above applicants, as well as Demchak, discussed infra, would have testified as described, there is no indication that Respondent also agreed to accept as true the statements ascribed to them under the stipulation. As these applicants did not testify in person, I have no way of assessing the credibility of their purported statements and, consequently, place no reliance on their stipulated testimony.

[7] Demchak did not testify, and the statements attributed to him were entered into the record pursuant to stipulation. Kresge admits refusing to give Demchak a copy of his application on advice of legal counsel.

forward to meeting with Mellow.[8] Mellow, however, advised Schraeder that due to a busy schedule he would not be at the meeting, but that his attorney, David Koff, Dembeski, and possibly his wife, would be attending. Schraeder claims he told Mellow he was pleased that Mellow was busy and that maybe "we could help you out here with some manpower," and that Mellow responded, in sarcastic fashion, "Yeah, maybe [we'll] hire them." Schraeder replied that it was up to Mellow. According to Schraeder, Mellow pointed out that Schraeder was on his property, at which point Schraeder replied he was unaware he was on Mellow's property and asked if Mellow wanted him to leave. Mellow advised Schraeder that he "owned all this property," and that he just wanted to know "what the matter is." Schraeder replied, "there's no matter. I brought a couple [of] men up, I'm waiting for them to fill out applications." According to Schraeder, it was at the end of this conversation that Gansel, Henger, and Slusher reappeared, at which point Mellow got into his truck and left.[9]

Job applicant Tom Skelly, who is not alleged as a discriminatee, was called as a rebuttal witness by the General Counsel to refute Kresge's testimony that union considerations did not factor into the hiring process. Skelly testified he applied for a job on May 25,[10] and that he deliberately concealed his union affiliation. He claims to have seen the "no union" sticker on the door and in filling out his application, he listed only his most recent employment, which for the most part was with nonunion firms, and deliberately omitted any reference to past union-affiliated employment, most of which occurred prior to 1988.[11] Skelly claims he returned a few days 1988.[11] Skelly claims he returned a few days later to deliver a resume, which he handed to Kresge, and that soon thereafter, Dembeski entered the office. Dembeski purportedly reviewed his application and resume, questioned him about his work experience, and then asked whether he was in the Union. When Skelly answered he was not, Dembeski purportedly stated, "I think we have some jobs coming up and I think we can place you. If you don't hear from us next week, call back."

Skelly claims he called back the following week, as instructed, but could not recall with whom he spoke. He further testified that "like maybe within two weeks, ten days, I don't know," Mellow called to advise him that he had a job, but indicated that "right now, things are moving around, I don't have a definite date." Mellow purportedly told Skelly he would keep in touch and that if Skelly did not hear from him, Skelly should call him back. Skelly claims that this went on for a "couple of weeks," and that in the first week of June, Mellow called and asked him to start that same week. Skelly further testified, however, that the day after he received Mellow's call, Flanagan told him of the availability of work with another employer, and that he took this latter job and "blew off" Mellow's job offer.

Skelly's testimony, while uncontroverted, was vague and unconvincing, and, in my opinion, not credible. Skelly's account of his various contacts with Mellow leading up to the alleged job offer and starting date in the first week of June contains an inconsistent time frame and does not ring true. For example, following the filing his application on May 25, Skelly, as purportedly instructed by Dembeski, called back the following week, which logically places the call at some time during the end of May or the beginning of June. Within 2 weeks or 10 days, which would be in the second or third week of June, Mellow purportedly informs him that a job was available, but does not give him a definite starting date. According to Skelly, Mellow continued to call him for a couple of weeks thereafter, which, as per Skelly's sequence of events, suggest that as of late June or maybe even early July, Skelly had not yet received his job offer. This, however, conflicts with Skelly's other statement that he received a job offer in the first week of June and was asked to start that same week. Given the vagueness and inconsistencies in his testimony, I am convinced that Skelly was not being candid in describing his contacts with Dembeski and Mellow, and conclude that his testimony that Dembeski asked him if he was a union member was, like his other testimony, a fabrication. That Skelly was capable of such fabrication is evident from the fact that he apparently had no qualms about falsifying his employment application as requested by Schraeder.[12]

[8] The meeting referred to by Mellow and Schraeder was an initial bargaining session scheduled for July 5.

[9] Schraeder makes no mention in his testimony of Gansel having been present during this conversation or of Gansel offering to shake Mellow's hand, and the latter refusing to do so. In fact, Schraeder testified that Gansel, Henger, and Slusher came out of Respondent's premises at the conclusion of his discussion with Mellow, and that when they pulled up to Schraeder's car, Mellow simply jumped in his truck and left. Further, Gansel's claim to having heard Mellow angrily state that Schraeder was harassing him and that he was going to tell Schraeder to get off his property is hardly consistent with Schraeder's own testimony that Mellow shook his hand and at no time asked him to leave the premises. Neither Henger nor Slusher, who purportedly were present during this incident, were called to corroborate Gansel's testimony. I found Gansel's testimony unpersuasive. While obviously called to corroborate Schraeder's account, given the obvious inconsistencies in their testimonies, Gansel was not very successful. Gansel's demeanor on the witness stand was poor, and this fact, along with the inconsistency between his testimony and that of Schraeder, leads me to doubt his overall reliability as a witness to this event. In fact, I am convinced that Gansel most likely learned of the Schraeder-Mellow conversation from Schraeder himself and that, in an effort to aid the Union's cause, concocted his account of what transpired between Schraeder and Mellow, and between Mellow and himself. Schraeder's version, while more believable than Gansel's, was, in my view, embellished in certain respects and not wholly trustworthy. For example, Schraeder's testimony that he and Mellow shook hands and that Mellow reminded him of the upcoming meeting does not square with his subjective characterization of Mellow as being very angry and upset. While I accept Schraeder's testimony that he and Mellow conversed while Gansel, Henger, and Slusher were inside filling out applications, I reject as pure hyperbole his further testimony that Mellow "stormed out" of his office, was "pretty much yelling," and was "sarcastic."

[10] Skelly was not clear as to when he applied, and recalled only that it was in spring 1994. Schraeder, however, confirmed that Skelly put in his application on May 25. (Tr. 48.)

[11] Skelly had worked for a union employer for approximately 90 days, from late 1993 to early 1994, but did not disclose this on his application. The General Counsel suggests that Skelly's reluctance to include this union work on his application was influenced by the "no-union" decal on Respondent's door. Schraeder's testimony, however, indicates that Skelly was instructed by Schraeder not to disclose his past union employment. (Tr. 48.) I accept Schraeder's testimony in this regard and find that it was Schraeder's instructions, not the decal, which caused Skelly not to reveal his full employment history on his application.

[12] In rejecting Skelly's uncontradicted testimony, I rely on the Board's holdings in *Operative Plasters Local 394 (Burnham Bros.)*, 207 NLRB 147 (1973); *McCormick & Co*., 254 NLRB 922 (1981); and *Dentech Corp*., 294 NLRB 924, 927 (1989).

2. Prenegotiation conduct

a. June 14 Koff-Schraeder conversation

Following execution and approval of the settlement agreement in May 1994, Schraeder hand-delivered to Respondent a letter dated June 6, along with a copy of the Union's proposed collective-bargaining agreement, and advised that the Union was available to meet for negotiations on June 14, 15, or 16. Schraeder testified that on June 14 he received a call from Respondent's labor counsel, David Koff, who advised that he could not meet on the suggested dates, and proposed an alternative date. After agreeing to a July 6 meeting, Koff, according to Schraeder, stated he would like to get together with the Union to discuss an agreement "no matter how remote that might be." Schraeder purportedly told Koff that the word "remote" bothered him, to which Koff replied, "Well, Mr. Mellow is set against signing an agreement." Schraeder recalls telling Koff, "Well, I would like to see that we start on a positive note rather than a negative note and that we come to some type of a workable agreement that both parties would be satisfied with," and Koff allegedly stated, "he would speak to Mr. Mellow in an effort to have us meet, but he didn't know if we would be able to come to terms." Schraeder responded, "Well, I would still rather start on a positive note rather than going into this on a negative note." (Tr. 53–54.)

Credibility resolution

Although Koff testified at the hearing, he was not asked about the purported statements attributed to him by Schraeder regarding Mellow's alleged opposition to signing a contract. However, the inconsistency in Schraeder's testimony on direct and cross-examination regarding his conversation with Koff convinces me that Schraeder was being less than candid in recounting the substance of his conversation with Koff. For example, while stating on direct examination that Koff informed him that Mellow was "set against signing an agreement," Schraeder on cross-examination altered his testimony by claiming, "I didn't say that he wouldn't be not willing to sign it." Apparently recognizing his inconsistency, Schraeder sought to extricate himself from his dilemma by stating that what Koff had actually said was "all right, he would indeed talk to Mr. Mellow, but Mr. Mellow indicated that he did not want to come to agreement." Schraeder's vacillating statements lead me to conclude he was not being fully candid about what Koff may have said, and may have fabricated some or all of his conversation with Koff.

Koff, on the other hand, struck me as a fully reliable and credible witness who testified in a candid and forthright manner regarding matters addressed to him. While he was not, as noted, questioned as to his conversation with Schraeder, I find it highly unlikely that Koff, a seasoned labor law practitioner with some 33 years' experience, would be so naive as to make the comments attributed to him by Schraeder. Further clouding Schraeder's credibility on this matter is the fact that during Schraeder's cross-examination Union Attorney Bernard Katz nodded his head repeatedly at Schraeder as the latter was responding to questions posed to him by Respondent's counsel, creating the clear impression, in my view, that he was seeking to aid Schraeder in his testimony. When the matter was brought to his attention, Katz initially denied his behavior, but subsequently acknowledged that this had occurred and agreed to refrain from further doing so. Katz' conduct in this regard, whether done knowingly or unwittingly, casts further doubt on Schraeder's overall credibility as a witness. (Tr. 103.)

b. The June 17 Koff-Katz conversation

Following his conversation with Schraeder, Koff spoke with Katz regarding the first bargaining session. Katz claims that during this June 17 phone conversation, he and Koff discussed the settlement agreement and Respondent's recognition of the Union. Katz testified he told Koff that he did not think there would be much of a problem achieving a collective-bargaining agreement and that he wanted to set a date, time, and place for the first meeting in hopes that agreement could be reached that same day. Katz claims he asked Koff if Mellow would be present at the meeting, and that Koff replied, "We'd all be better off if Mr. Mellow were not present" because "an agreement could be better achieved in his absence" due to Mellow's hot temper. Koff assured Katz that Respondent would be represented at the negotiations by someone with authority to enter into a final agreement.

Koff admits having had a conversation with Katz on June 17 and agreeing to meet on July 5. However, he testified that Katz said something to the effect that "we'll meet, it should take no longer than 10 minutes or so to sign a contract and that we could all go home." Koff replied that that would be somewhat unusual, and jokingly told Katz, "You're always the perpetual optimist."

Credibility resolution

Except to the extent that both recall Katz being optimistic about arriving at a quick agreement, Koff's version of what was said varies significantly from Katz' description of the conversation. I credit Koff over Katz regarding the substance of the discussion. Koff's straightforward answers to questions, and his excellent demeanor as a witness convinces me that he testified in a truthful and honest manner. Katz, on the other hand, was not very convincing. Initially, his conduct during Schraeder's testimony in which he appeared to be aiding the latter during cross-examination causes me to doubt the veracity of his own testimony. Further, assuming, as suggested by Katz, that he and Koff discussed Mellow during their conversation, Katz presumably would have learned at that time that Mellow was Respondent's owner. However, from Schraeder's testimony as to what occurred during the July 5 bargaining session, it is quite apparent that Katz had no prior knowledge prior to July 5 of who Mellow was since, according to Schraeder, during the July 5 meeting Katz asked who owned the Respondent, and when told it was Rich Mellow, commented, "Well, how can we have an appropriate meeting here if the owner isn't here to make a decision on even signing?" Clearly, if Katz had learned who Mellow was during his conversation with Koff on June 17, why would he make the comments attributed to him by Schraeder during the July 5 meeting? The answer, quite simply, is that he and Koff did not discuss Mellow at all during the June 17 conversation, and that Katz first learned of Mellow at the July 5 meeting. Katz' claim that he and Koff discussed Mellow during their June 17 phone conversation is therefore rejected as not credible, and Koff's version as to what was said is accepted as true.

3. The July 5 bargaining session

The parties held their first bargaining session on July 5. Koff and Dembeski were present for the Respondent, the latter serving primarily in an advisory capacity and the former as

Respondent's chief negotiator. The Union, in turn, was represented by Schraeder, Business Manager John Flanagan, and Attorney Katz.[13] Much of this first meeting was spent discussing the type of agreement the Union had with other employers and what would best suit the Respondent's needs. The Union suggested the possibility of the parties entering into a residential agreement. Koff and Dembeski both looked over the Union's proposed agreement and, after comparing its provisions to the type of work being done by Respondent, expressed the view that the Union's contract would not work for Respondent. However, as neither Koff nor Dembeski appeared fully familiar with the residential-type agreements proposed by the Union, Koff advised Schraeder that the matter would have to be discussed with Mellow as the latter was also unfamiliar with such agreements. Koff agreed to get back to the Union on this matter, stating that this "was something that maybe we could mold into an agreement."

With some minor variation, Schraeder's testimony essentially accords with Koff's version of what was discussed during the July 5 session. He testified that in addition to discussing the residential agreements, there was discussion regarding educational matters and apprenticeship training. As to the residential agreements, Schraeder claims that either Koff or Dembeski inquired whether Respondent would be able to mix "residential people" with "industrial people" and that he responded, "No, that's why we have two programs that we don't allow that mix." This, according to Schraeder, was one of Respondent's main objections during this first session. Schraeder stated that Koff "seemed very receptive towards the small jobs or expanded scope residential program" and advised that he would have to thoroughly discuss the matter with Mellow "to see if there could be a way that we could come to an agreement." According to Schraeder, the parties concluded the meeting on a pretty positive note regarding the prospects for a future contract. Koff agreed to contact Flanagan after discussing the matter with Mellow.

Katz testified that this first meeting began with a general discussion of procedures used by the Union in negotiating with contractors, and proceeded to a discussion of how any agreement reached would apply to existing jobs that had already been "costed" out by Respondent. He claims that the parties had an "amiable discussion" of the Union's flexibility in accommodating the Respondent so that there would be no economic difficulty regarding existing jobs, and went on to discuss concluding an agreement along the lines of the standard agreement used by the Union with other area contractors. According to Katz, either Dembeski or Koff then stated that "they could not make any substantive decisions, that they would have to get back to me because all decisions were really made and arrogated unto himself in the sole and complete and exclusive power of Mr. Mellow." Katz admits he "exploded" on hearing this because he "had made a lot of alterations and plans to be up there the day after July 4, on the assumption that we were going to conclude an agreement." Katz then stated, "Well, where the f—k is Mellow? get him the f—k over here!" Katz claims that Respondent's representatives merely laughed and remarked, "You don't want him in the room!" From that point on, according to Katz, the discussion "went sort of downward." Interestingly, Flanagan, who was present at this meeting, and who testified at the hearing, was not questioned about what went on during this meeting.

4. Post-July 5 conduct

Koff called Flanagan the very next day to inform him that Mellow had some further questions regarding contractual items relating to economic matters, the moving of manpower, and one or two other small items, and suggested that Flanagan call Mellow directly to arrange for a one-on-one meeting to discuss the possibility of an agreement, to which Flanagan agreed. On July 12, Flanagan called Mellow. Mellow, however, was unavailable at the time so Flanagan left word with Kresge to have him call back. Mellow returned Flanagan's call later that day.[14] According to Flanagan, after asking Mellow if "we could get together to come to some kind of an agreement," Mellow responded, "Look all I want to be is double-breasted. If I could be double-breasted I'll sign an agreement right now." Flanagan responded that for the protection of other union contractors, what Mellow sought would not be possible, and that if Mellow became a union contractor, "we wouldn't want him competing against that kind of atmosphere out there." Notwithstanding Flanagan's opposition to his suggestion for a double-breasted arrangement, Mellow still expressed an interest in meeting with Flanagan. Mellow, according to Flanagan, added that he did not want Schraeder present because he didn't care for Schraeder and considered him a troublemaker.[15] Mellow agreed to get back to Flanagan.

Not having heard from Mellow, Flanagan phoned him on July 29. Kresge answered and informed Flanagan that Mellow was not in the office,[16] that she would page him, and that hopefully Mellow would return his call. Mellow, however, did not call back. No further communications were had between the parties until August 18, when Katz wrote to Koff requesting a counterproposal to the Union's proposed agreement. On August 24, Respondent forwarded its counterproposal to the Union. (G.C. Exh. 20.)

5. The October 3 bargaining session

A second bargaining session between the parties occurred on October 3 at the Union's office. Mellow, Koff, and Dembeski attended this meeting on Respondent's behalf, with Katz, Schraeder, and Flanagan present for the Union. Schraeder testified that the meeting began with Koff asking if the Union had any counterproposal to make to Respondent's September con-

[13] Dembeski credibly testified that Katz did not show up for the meeting until it was almost over. His testimony in this regard is supported by Koff and Schraeder who testified that Katz was late for the meeting, which lasted approximately 1 hour. During his testimony, Katz made no mention of having arrived late for the meeting. In fact, in describing what transpired at the July 5 session, Katz stated that "the session started with a . . . generalized discussion about procedures that are utilized in negotiating with a contractor," creating the distinct and misleading impression that he was present during the entire the meeting.

[14] Flanagan testified that Mellow identified himself to his secretary as "Richard non-union Mellow." Flanagan, however, did not read anything into Mellow's comment and acknowledged that he simply viewed it as a joke and did not take it in any other manner.

[15] Given what, in my view, was an amiable discussion between Schraeder and Mellow on June 17, I find it highly unlikely that would have called Schraeder a troublemaker, and do not credit Flanagan in this regard.

[16] Mellow's absence from the office was not unusual, for he testified, credibly and without contradiction, that on average he spends only 4 to 5 hours per week in his office and that he spends most of his time in the field.

tract offer, to which Schraeder responded, "Yes, we ask that Article 18 (a "double-breasting" provision) be removed in its entirety." Except for Katz' assertion, discussed below, there is no indication that the Union explained its reasons for opposing such a provision or that it offered any modification or proposals of its own in response to article 18, or to the counterproposal in general. Schraeder claims that no agreement was reached regarding article 18. He further testified that Mellow expressed an unwillingness "to sign a contract where he would be locked up for a couple of years," but that Mellow further stated "that if this thing could work, you know, he wanted to see if it would work." Schraeder purportedly responded that "it wouldn't be fair to sign for one job or just sign for a very short period of time you have to give it a chance to work." Schraeder purportedly suggested that the Union would be willing to sign a 1-year contract after which, if Mellow was not satisfied with how things worked out, he would be free to walk away. Schraeder claims that Mellow agreed to consider the offer and to get back to the Union within a week. He further claims that at some point during the meeting, Mellow indicated he wanted to know every line in the contract rather than go into the contract blindly, and that Flanagan offered "to sit down and go over this with (Mellow) line by line." Mellow purportedly promised to get back to the Union within a week.

Katz testified that numerous items were discussed at the October 3 meeting, including the duration of any agreement reached, as well as economic matters, such as whether jobs currently in progress would be affected by any such agreement. As to article 18, Katz expressed opposition to the inclusion of such a provision in any agreement because, in his view, it would have the effect of nullifying the entire agreement. He testified that Respondent did not withdraw article 18 from its proposed contract, but agreed to "look at it again." As to further negotiations, Katz stated that Flanagan and Mellow agreed to arrange for a future meeting. He could not, however, recall if Flanagan was to contact Mellow, or vice versa.

Koff testified that, during the October 3 meeting, Katz strenuously objected to article 18, asserting that the provision amounted to an unfair labor practice. Koff described Katz as being very angry during the meeting, which he attributed to the Union's inability to achieve the quick, same-day agreement Katz had unreasonably anticipated. More importantly, Koff testified, contrary to both Schraeder and Katz, that after caucusing with Mellow and Dembeski the Respondent withdrew article 18 from the table, and that the meeting then turned to economic matters and broke up soon after that. Koff testified that after Respondent withdrew article 18 from the table he asked for, but did not receive, and to date has yet to receive, a counterproposal from the Union regarding Respondent's September contract proposal as modified by the removal of article 18.

No further meetings were scheduled or held after October 3. Although Flanagan was present at both bargaining sessions, the General Counsel called him as a witness for the sole purpose of showing that following the October 3 session Flanagan unsuccessfully tried to arrange a meeting between Mellow and himself. Thus, Flanagan testified that he received a call from Mellow 1 week after the October 3 meeting wherein Mellow offered to get together "one-on-one, have a couple of beers, or go out for dinner or something" to see if they can "come to some type of agreement." Flanagan purportedly agreed to do so and asked where and when they could meet, to which Mellow replied, "Well, I'm a little busy this week, maybe next week." Flanagan claims that Mellow agreed to call him the following week with a particular date, and suggested that if Flanagan did not hear from him, he should call back.

Flanagan claims he did not hear from Mellow and consequently called him on October 17, as had been suggested, and that Dembeski answered the phone. After informing Dembeski that Mellow had agreed to get back to him regarding a meeting, Dembeski offered to page Mellow and have him get back to Flanagan. According to Flanagan, Mellow did not return his call, and on October 20, Flanagan called again and this time spoke to Kresge, who put Mellow on the line. Flanagan purportedly reminded Mellow that he was supposed to get back to him for a meeting, to which Mellow responded that he was extremely busy and did not know when they could meet, but that he would get back to Flanagan as to a time and place. Flanagan claims he called again on October 27 and spoke with Kresge, who informed him Mellow was not in but that she would page him and would have him return the call, which Flanagan further asserts never occurred.

On January 12, 1995, Schraeder wrote to Mellow requesting negotiations be resumed during the morning or afternoon of January 18, 19, or 20. By letter dated January 18, 1995, Mellow responded that his attorney was out of town and unavailable to meet on any of the three suggested dates, but that he (Mellow) would get back to Schraeder within 2 weeks to set up a meeting. Mellow, however, did not get back to Schraeder regarding further negotiations.

B. Discussion and Findings

1. The alleged 8(a)(1) conduct

a. Soliciting disclosure of applicants' union affiliation

The complaint alleges and the General Counsel contends that Respondent, on May 23,[17] unlawfully interrogated applicants Schraeder, Kenehan, McIntyre, and Bubenheimer by asking them to disclose their union affiliation as part of the application process. While not denying the particulars of this allegation, the Respondent nevertheless contends that the allegation should be dismissed because its practice of inquiring into an applicant's union status was immediately discontinued on advice of counsel the very next day, as evident by its May 24 letter to the Union. It further contends that this alleged unlawful conduct was addressed by the settlement agreement and is therefore not before me. I agree with Respondent's latter assertion.[18]

It is well settled that a settlement agreement disposes of all issues involving presettlement conduct unless prior violations of the Act were unknown to the General Counsel, not readily discoverable by investigation, or specifically reserved from the settlement by mutual understanding of the parties. *Hollywood Roosevelt Hotel*, 235 NLRB 1397 (1978). In determining whether evidence of prior violations was "known" to the Gen-

[17] The complaint alleges that the Respondent had engaged in this conduct "from on or about May 25, 1993 to on or about May 24, 1994." However, as evident from the employment applications of employees Schraeder, Kenehan, McIntyre, and Bubenheimer, and as the General Counsel's readily admits in his posthearing brief, the last alleged interrogations occurred on May 23, 1994.

[18] While, for the reasons discussed infra, I make no finding as to the merits of this allegation, I note that such conduct is viewed by the Board as unlawful, *Clark Printing Co*., 146 NLRB 121, 122–123 (1964); *Colton Sportswear Mfg*., 182 NLRB 825, 846 (1970), and the fact that the practice is subsequently discontinued would not ipso facto render such conduct moot. *Colton Sportswear*, supra.

eral Counsel, the Board looks to whether such evidence "was or should have been discovered through a proper investigation." *Quality Hotel Tacoma Dome*, 314 NLRB 538, 544 (1994).

The settlement agreement resolving the allegations in Case 4–CA–22023 was, as noted, approved by the Acting Regional Director for Region 4 on May 24. The alleged unlawful interrogations of applicants Schraeder, Kenehan, McIntyre, and Bubenheimer occurred on May 23, 1 day prior to approval of the agreement, and thus constitute presettlement conduct clearly encompassed and resolved by the terms of that agreement. No claim has been made by the General Counsel or the Union, nor indeed is there any evidence to show, that the parties agreed to have this matter specifically reserved from settlement, nor is any contention being made that the alleged violations were unknown to the General Counsel or were not readily discoverable by an investigation. In these circumstances, I find that this particular allegation has been resolved by the settlement agreement and is not properly litigable in this proceeding.

b. The alleged unlawful interrogations

(1) Alleged interrogation by Mellow of employee Burdick

It is alleged that on August 19 Mellow unlawfully interrogated employee Burdick regarding a conversation the latter had with Schraeder at the jobsite. Thus, Schraeder purportedly approached Burdick at the jobsite, asked him how much he was making, and said "something about overtime and whether I was getting time and half." He and Schraeder discussed "exactly what I was supposed to be making and everything" and discussed prevailing wage issues. As to the alleged interrogation, on direct examination Burdick stated that a few days after his discussion with Schraeder, as he was installing fixtures, Mellow asked him about his conversation with Schraeder. Burdick claimed he told Mellow that he and Schraeder only discussed his earnings. Mellow, according to Schraeder's direct testimony, did not ask anything further and left.

Mellow's testimony regarding this incident is that he had been advised that Burdick was seen talking to Schraeder during working hours, and that on or about August 22, he approached Burdick and said to him that if he wanted to talk to Schraeder he should do it on his own time, not while he was working. Mellow testified that Burdick admitted having had a conversation with Schraeder and replied, "Okay, I won't do it." Mellow was unable to recall who reported the Burdick-Schraeder meeting to him. He further testified that employees were free to do what they wished on their own time, including breaks and lunch period.

I credit Mellow over Burdick regarding the above incident, and find that Mellow did not question Burdick as to his conversation with Schaefer, but simply instructed him not to talk to Schraeder during the times he should be working. While both Mellow and Burdick experienced problems with their recollection, a comparison of their testimony and demeanor on the witness stand persuades me that Mellow is the more credible of the two. Mellow, as noted, could not recall who informed him of the Burdick-Schraeder conversation, or the exact time of day it occurred. However, he remained steadfast in his assertion that the Burdick-Schraeder discussion occurred when Burdick should have been working. Despite this brief lapse in memory, Mellow's answers to questions posed on direct and during cross-examination regarding this incident were consistent, direct, and forthright, and without any hint of fabrication or embellishment.

Burdick's testimony regarding this incident, on the other hand, was at times flippant, self-contradictory, and equivocal. Thus, when questioned on direct examination by the General Counsel, Burdick, as noted, testified that after Mellow inquired about his conversation with Schaefer, Mellow simply departed. During questioning by the General Counsel, Burdick made no mention of any further comments having been made by Mellow at that time. However, when questioned by the Union's attorney, Burdick embellished his earlier testimony by stating that Mellow had also told him he "didn't have to talk to [Schaefer] if [he] didn't want to." Further, despite his earlier testimony that these were Mellow's exact words, Burdick, in an apparent change of mind, suggested that what Mellow had actually said was "You don't have to talk to that asshole if you don't want to." (Tr. 153.) Burdick's recollection fared no better during cross-examination. For example, when asked if Mellow had instructed him not to talk to Schraeder while working, Burdick expressed uncertainty, stating, "I don't think so," and, when pressed on the matter, conceded Mellow might have told him, and that he "might not have been listening" to Mellow at the time.

Burdick's equivocal response regarding this incident renders his testimony unreliable and of little probative value. His flippant and derisive response to certain questions during cross-examination further detracts from his overall credibility as a witness. Thus, when asked about the timing of his conversation with Schraeder, Burdick replied, "We were having lunch." When asked if he knew when during the lunch period it occurred, he became flustered and sarcastically replied, "12:09," followed by "I don't know. It was sometime between 12:00 and 12:30." Further, when asked by Respondent's counsel whether Mellow had instructed him to speak with Schaefer on Burdick's own time, Burdick responded somewhat derisively, "That's a little eloquent for Rich [Mellow]." Overall, I do not credit Burdick's testimony.

(2) Alleged interrogation of Burdick by Dembeski

The interrogation of Burdick by Dembeski is alleged to have occurred on June 17 at Respondent's office when Burdick went to pick up his paycheck. Burdick testified that in the presence of other employees who were also picking up their checks, Dembeski "just asked me out of the blue if I had a union card out of Binghamton," to which he responded affirmatively.

Dembeski provided a somewhat different version of this incident. He testified that on or about June 17, a payday, he was in the office with four or five other employees, including Burdick, who were there to pick up their paychecks when a discussion ensued. Dembeski recalls that they were all just standing around when "a joke was started by one of the guys about the union or something like that" at which time he turned and said to Burdick, "You still carry your card, don't you?" Burdick, according to Dembeski, replied, "Yeah, I still have my card. It's the worst thing I ever did." According to Dembeski, except for some more small talk that followed, that was the end of the conversation. He testified that he was fully aware from the day Burdick started working a year earlier that Burdick was a member of the Union.

I credit Dembeski's version of this incident. Burdick's statement that Dembeski asked him clear "out of the blue" about his union status is simply not believable, especially in light of his other less than credible testimony. Rather, Dem-

beski's testimony, in which he readily admits having asked if Burdick still carried his union card, is a more plausible account of what transpired. Dembeski's question reflects prior knowledge of Burdick's union status and is consistent with Dembeski's statement that he was fully aware since Burdick's hiring a year earlier of the latter's union membership. I find nothing coercive about Dembeski's question, nor do I view it as an attempt by Dembeski to ascertain a fact of which he already knew. Rather, the question to Burdick was an innocuous one made in the context of a casual, friendly, and joking conversation.

The General Counsel also used Burdick for purposes of showing Respondent's bad-faith bargaining intentions. Thus, Burdick testified to statements allegedly made by Dembeski on May 20, which purportedly reflect Respondent's bargaining attitude. Burdick claims, for example, that on May 20, he was in Respondent's office, together with employee Brian Barnes, and Dembeski, when Barnes asked Dembeski how things were going with the Union. According to Burdick, Dembeski replied, "[I]t's really no problem, it's a paper war, and [Respondent] was going to do what their lawyer told them to do and go through the motions." Dembeski denied having made such remarks. I credit Dembeski over Burdick and find that no such remarks were made.

Burdick's testimony regarding the above discussion is ambiguous at best and full of uncertainty. The following colloquy between the General Counsel and Burdick best exemplifies the dubious nature of Burdick's testimony regarding this matter:

> Q: Was there any mention of Union proposals and negotiations?
>
> A: I don't know what you mean. Oh, just that they were going to go—they didn't have to accept any of them I think.
>
> Q: And what were they going to do?
>
> A: Just let them pass by, I guess, and just do whatever their lawyer told them to do.

Burdick further testified in the following fashion to comments allegedly made by Dembeski regarding the Board's Rules:

> Q: How about any mention of NLRB rules? Did he say anything about that?
>
> A: There was nothing really that they could do to them.
>
> Q: Nothing who could do to him?
>
> A: The NLRB could do to him, really. They were just—I guess there was no way they could hurt him.
>
> Q: The NLRB could do?
>
> A: Yeah, they were powerless like, really.

Burdick's testimony thus suggests that much of what he was relating concerning Dembeski's alleged statements to Barnes was based on guesswork, rather than on an actual knowledge of what was said. Accordingly, I place no credence on Burdick's testimony and credit Dembeski's denial that no such remarks were made by him.

c. The "No Union" decal

The General Counsel does not dispute the fact that the "no union" decal has been on the door since about 1987 or 1988, certainly long before the Union first came on the scene in late 1993, as credibly testified to by Dembeski and Kresge.[19] Kresge also testified that the decal was intended as a joke for Mellow. As no evidence was adduced to counter Kresge's testimony, her assertion in this regard is accepted as true. The General Counsel's theory of the violation is, in any event, not premised on how the decal appeared on the door in the first place or why it was placed there. Rather, the General Counsel's claim that the Act was violated centers on a belief that the Respondent was somehow under an affirmative obligation to remove the decal upon its execution of the settlement agreement and its grant of recognition to the Union. By failing to remove the decal the Respondent, the General Counsel argues, violated Section 8(a)(1) because it effectively conveyed to bargaining unit members and job applicants alike the message that Respondent did not intend to recognize or bargain in good faith with the Union or to abide by the settlement agreement. I find no merit in the General Counsel's argument.

Implicit in the General Counsel's argument that Respondent was obligated to remove the decal is the suggestion that the decal on its face is somehow coercive of employee rights. The Respondent, on the other hand, takes the position, in which I fully concur, that the "no union" decal was not coercive, and did not restrain or interfere with its employees' or applicants' Section 7 rights. Rather, the Respondent argues that the decal is protected speech under Section 8(c) of the Act.

Under Section 8(c) of the Act, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." *NLRB v. Gissel Packing Co*., 395 U.S. 575, 617–619 (1969).[20] Here, the "no union" decal on its face amounts to nothing more than an expression of opinion regarding the proponent's antiunion sentiments, and contains no coercive or threatening message. As such, I find, in agreement with the Respondent, that the decal in question constituted a lawful expression of opinion protected under Section 8(c) of the Act. There is, in any event, no hard evidence to show that the Respondent was somehow responsible for the placement of the decal. The evidence of record indicates only that the decal was given to Mellow as a joke more than 7 years ago. Arguably, the decal could have been given to Mellow and placed on the door by anyone, including a rank-and-file employee. Given the lack of evidence regarding this matter, I decline to ascribe the placement of the decal on the door to the Respondent.

However, as previously noted, the gist of the General Counsel's argument regarding this allegation is that the violation resulted from the Respondent's failure to remove the decal following its recognition of the Union, rather than from the circumstances surrounding its placement on the door in the first place. The General Counsel cites no case authority, nor have I found any, to support the view that on entering into a bargaining relationship with a union, an employer becomes legally obligated to sanitize its workplace by removing from its prem-

[19] Dembeski's undisputed testimony reveals that the decal has been on Respondent's door for some 7 to 8 years. Kresge corroborated Dembeski when she testified that the decal was there before she began working for Respondent in 1989.

[20] Sec. 8(c) provides that the [expression] of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of [the] Act, if such expression contains no threat of reprisal or force or promise of benefit.

ises any and all material, such as the decal in question here, that might be anathema to the union or the employees it represents. While the purported offensive material here involves only a "no union" decal, taken to its logical conclusion the General Counsel's position, if adopted, effectively would require an employer to purge its workplace of any antiunion matter, or risk having charges filed against it. The General Counsel contends that by allowing the decal to remain the Respondent was merely reinforcing the Respondent's position, as Burdick claims was stated to him by Dembeski on May 20, that it had no intentions of bargaining with the Union or abiding by the terms of the settlement agreement. The flaw in the General Counsel's argument is that, as found above, Dembeski never made such remarks to Burdick. In summary, I find that neither the presence of the decal on the door, nor the Respondent's failure to remove it upon execution of the settlement agreement amounted to unlawful conduct. According, this allegation is dismissed.

2. The 8(a)(3) allegations (refusal to consider/hire union applicants for employment)

The General Counsel, as noted, asserts that Respondent unlawfully refused to consider for employment or to hire the above-named 14 individuals because they either supported or were members of the Union. Section 8(a)(3) makes it unlawful for an employer to discriminate against an employee in regard to hire or tenure of employment or any term or condition of employment, or to encourage or discourage membership in any labor organization.

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981),[21] the Board established a causation test to be used in all cases alleging a violation of Section 8(a)(3) and (1) that turn, as in the instant case, on employer motivation. Under that test, the General Counsel is first required to make a prima facie showing sufficient to support the inference that the employees', or in this case job applicants' protected conduct was a "motivating factor" in Respondent's decision not to hire or consider them for employment. Stated otherwise, the General Counsel must establish by a preponderance of the credible evidence that the alleged discriminatees engaged in union activities, that the employer had knowledge of such conduct, and that the employer's actions were motivated by union animus.[22] If the General Counsel is able to make such a prima facie showing, the burden will shift to the employer who must then demonstrate that it would have taken the same action even in the absence of the employee's or applicant's protected conduct.

Examining the evidence in light of the above principles, I find that the General Counsel has failed to make a prima facie showing that the Respondent's failure to consider for employment or to hire any of the 14 alleged discriminatees was motivated by antiunion considerations.

a. The knowledge issue

It is undisputed, and I find, that all the hiring was done by Mellow. It is also undisputed that all 14 named discriminatees filed applications for employment with Respondent on the dates alleged in the complaint, that Mellow hired some 13 employees during the same period that it was receiving applications, and that none of the 14 alleged discriminatees were among those hired. At issue here is whether, as asserted by General Counsel in his posthearing brief, Mellow "knew or suspected" that the 14 alleged discriminatees were union members or supporters, and whether this was a factor in their not being hired by Mellow.

All 14 named discriminatees generally followed the same pattern in submitting their job applications. Thus, they appeared at Respondent's premises either with Schraeder or at his suggestion on various dates between May 23 and June 17, and filled out applications for employment that they then turned in to Kresge, but not before requesting copies. There is little doubt that Kresge either knew or had reason to believe that most, if not all, of the 14 applicants were in some way associated with the Union Thus, she testified that she reviewed all the applications filed by these individuals and that some of them e.g., those of Schraeder, McIntyre, Kenehan, Gansel, Henger, Slusher, and Kerrigan contained specific reference to the applicant's union affiliation.[23] Kresge's further testimony regarding the applicants' "unusual" comportment while filling out their applications–e.g., requesting copies of their applications which had not happened before, failing to ask any questions about the job itself or benefits being paid, laughing aloud, and asking each other what they should include on their applications suggests that Kresge may have, at the very least, suspected that even those applicants who did not mention a union affiliation on their applications were somehow involved with the Union.

While Mellow did not personally review any of the applications filed by the alleged discriminatees, and could not therefore have known of their purported union sympathies from information contained therein, other evidence of record establishes that Mellow clearly knew or had reason to believe that applicants Schraeder, Kenehan, McIntyre, Gansel, Henger, and Slusher supported or were members of the Union. Mellow's knowledge of Schraeder's involvement with the Union can hardly be disputed, as Schraeder and Mellow had had prior dealings dating back to November 1992, when Schraeder began his "top down" organizational efforts. Mellow's admission that he was told by Kresge that Kenehan and McIntyre appeared at Respondent's office accompanied by Schraeder to fill out job applications, and that all three requested copies of their job applications, is, in my view, sufficient to support an inference that Mellow knew Kenehan and McIntyre, like Schraeder, were union supporters.[24] A similar inference can be drawn with respect to applicants Gansel, Henger, and Slusher, all of whom were driven to Respondent's office by Schraeder. The record reflects that Mellow was told by Schraeder that he had brought some men to apply for jobs, and that Mellow apparently observed the three applicants leave with Schraeder. In these circumstances, I am convinced that Mellow must have at least

[21] The Board's *Wright Line* test was approved by the Supreme Court in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

[22] *VOS Electric*, 309 NLRB 745, 751 (1992); and *HarperCollins Publishers*, *Inc*., 317 NLRB 168, 181–182 (1995).

[23] Kerrigan's application, unlike that of other applicants, does not specifically identify him as a union organizer or member. It does, however, list the Union as a reference source which Kerrigan has been familiar with for 20 years.

[24] Mellow testified that he believed Kresge informed him that Schraeder, Kenehan, and McIntyre had requested copies of their applications. Although Kresge denied having done so, I am convinced that she was either mistaken or had forgotten this particular fact. My finding in this regard does not, in any event, affect the reliability of her overall testimony which I find to be trustworthy and believable.

suspected, if not known, that Gansel, Henger, and Slusher were also union supporters.

There is, however, no evidence to establish that Mellow knew of the alleged union membership or sympathies of the eight remaining applicants, e.g., Dowdel, Caffrey, Dragon, Trygar, Kerrigan, Campbell, Demchak, and Ignoe. Unlike with Schraeder and the others discussed supra, there is no indication that any of these eight was seen by Mellow applying for a position with Respondent, or had been observed in Schraeder's company. While Kresge may have had reason to believe that these eight applicants were union members or sympathizers, she never made her suspicions known to Mellow. The General Counsel, unable to show that Mellow had direct knowledge of the applicants' union sympathies, argues that knowledge of the applicants' union sympathies is imputable to the Respondent because all the applications filed by the alleged discriminatees, including those of Dowdel, Caffrey, Dragon, Trygar, Kerrigan, Campbell, Demchak, and Ignoe, reflect extensive prior employment with union contractors and high pay rates which would be indicative of union employment. The General Counsel contends that these factors alone are sufficient under *Casey Electric*, 313 NLRB 774 (1994), and *Fluor Daniel, Inc.*, 304 NLRB 970 (1993), to establish that Respondent knew the applicants were union members or supporters.

The General Counsel has misread the Board's decisions in *Fluor Daniel* and *Casey Electric*, supra. In those two cases, the Board's finding that the employer had knowledge of an applicant's union sympathies was not, as suggested by the General Counsel, premised exclusively on the applicant's prior history of employment with union contractors or higher wage rates. In *Fluor Daniel*, for example, the Board relied on the fact that the applicants clearly and expressly identified themselves as union supporters by writing the words "voluntary union organizer" on their applications, all of which, unlike the case at hand, were reviewed by the employer's human resources manager, who had responsibility for the hiring of applicants. Id. at 503–504. In *Casey Electric*, the Board's finding of employer knowledge was premised not only on the applicants' prior work history, but also on the fact that the employer unlawfully interrogated applicants about their union affiliation, and the fact that applicants openly displayed their union affiliation by wearing union caps or stickers. I find nothing in either *Casey Electric* or *Fluor Daniel* to suggest that the Board will infer knowledge of union support solely from an applicant's prior employment with union contractors.

The General Counsel's argument here is similar to that considered and rejected in *Dorey Electric*, 312 NLRB 150 (1993). Addressing the question of whether an applicant's work history by itself is sufficient to satisfy the General Counsel's burden of proof under *Wright Line*, the administrative law judge in *Dorey Electric*, with Board approval, found that "while a work history may raise a suspicion that the applicant is or is not a union member . . . it falls short of being sufficient evidence on which to base a conclusion that the General Counsel's burden of proof has been met." Id at 152. The judge further noted that "no Board case has held that simply listing union contractors as previous employers or relatively high wages and/or having completed a union-sponsored apprenticeship course is sufficient to establish prima facie that the employer knew the applicant was a union member." Id. For the reasons stated *in Dorey Electric*, I decline to find, as argued by the General Counsel, that the Respondent must have known of the applicants' union membership or sympathies based on the latter's prior employment with union contractors or a wage history suggestive of a union scale pay rate.

However, even assuming, arguendo, that such factors as prior employment with union contractors and a history of high wages may, without more, be sufficient to satisfy the knowledge criteria under *Wright Line*, the General Counsel would still not have met his burden of proof, as the credible evidence of record clearly establishes that Mellow never saw or reviewed any of the applications filed by the alleged discriminatees, and obviously knew nothing of the applicants' work history. Nor, in any event, was it established that Mellow was familiar with any of the contractors identified on the applications. The only evidence in this regard came from Schraeder who testified as to his own personal knowledge of area union contractors, and sought to impute that knowledge, in a rather vague and unconvincing fashion, to Mellow by suggesting that Mellow must have been familiar with certain of the contractors listed on the applications. His subjective testimony as to which contractors Mellow may or may not have known is rejected as based on nothing more than mere speculation. Thus, even if the General Counsel had shown, which he did not, that Mellow reviewed the applications, no inference could be drawn that he would have known which of the contractors identified on said applications operated as a union or nonunion employer. *VOS Electric*, 309 NLRB 745, 754 fn. 15 (1992).

The General Counsel would also have me infer employer knowledge of the applicants' union membership from the fact that of all persons who applied for jobs, only the 14 alleged discriminatees requested copies of their applications, something which no applicant had ever done before, and that Respondent was aware that the Union had instructed them to do so. Mellow, as noted, readily admitted having been told by Kresge that Schraeder, Kenehan, and McIntyre, requested copies of their applications. However, contrary to the General Counsel's intimation, there is no evidence to suggest that Mellow was told that the other 11 alleged discriminatees also requested copies of their application. Thus, when asked if he was aware that anybody other than Schraeder, Kenehan, and McIntyre had requested copies of their applications, Mellow credibly answered, "No." In summary, the General Counsel has failed to sustain his burden under *Wright Line* of showing that Respondent had knowledge that alleged discriminatees Dowdel, Caffrey, Dragon, Trygar, Kerrigan, Campbell, Demchak, and Ignoe were union members or supporters. Accordingly, that aspect of the complaint alleging that the Respondent refused to consider for employment or to hire these eight applicants because of their support for, or membership in, the Union is without merit and is dismissed.

b. The union animus issue

The General Counsel, as noted, has established that Mellow either knew or had reason to know that applicants Schraeder, Kenehan, McIntyre, Gansel, Henger, and Slusher were union members or supporters. This factor alone, however, is insufficient to support a finding of a violation, for as part of his prima facie case, the General Counsel, as noted, must also show that union animus was a factor in Respondent's failure to hire or to consider for employment any of the above applicants. If the unlawful purpose is neither present nor implied, the Respondent cannot be found to have violated the Act. *Queen Kapiolani Hotel*, 316 NLRB 655, 663 (1995). The evidence required to

show animus need not be direct, and may be inferred from the totality of the circumstances proved. Id.

Much of the conduct cited by the General Counsel as evidence of Respondent's union animus has been found herein either not to have occurred or not to be unlawful. For example, the purported May 20 comments attributed to Dembeski by Burdick, which the General Counsel contends show that Respondent was determined from the outset to rid itself of the Union, as discussed supra, were simply not made and, as further found supra, the credible evidence fails to establish that Burdick was unlawfully interrogated by Dembeski or Mellow, as alleged. The General Counsel also claims that Respondent's union animus and open hostility toward unions were plainly evident from the "no union" decal displayed on its door. However, as found above, the decal constitutes nothing more than a statement of the proponent's views about unions in general, privileged under Section 8(c) of the Act.

The Respondent did engage in certain unfair labor practices, involving a failure to provide the Union with certain relevant information and a unilateral wage increase for unit employees (see discussion infra), which the General Counsel asserts serves as evidence of its antiunion animus. However, as explained below, such conduct, while unlawful, was nevertheless the product of a mistaken but good-faith belief by Respondent that its actions were justified, not from any alleged animosity towards the Union.

Finally, the General Counsel claims that Respondent's unlawful practice of requiring applicants to reveal their union affiliation raises a strong inference, which the Respondent failed to rebut, that such information was used to exclude union members from employment consideration. While this allegation, as noted, was resolved by the settlement agreement and is not properly before me, such evidence may nevertheless properly be considered as background evidence to establish a motive for Respondent's postsettlement conduct. *Kaumagraph Corp.*, 316 NLRB 793, 794 (1995); and *Host International*, 290 NLRB 442 (1988). There is, however, no evidence of record either to establish or to support an inference that Respondent used such information to exclude union applicants from employment.

Initially, as noted, Mellow never reviewed the applications and consequently would not have known which applicants had filled out the form disclosing their union affiliation. Further, of the 14 alleged discriminatees, only 3—Schraeder, Kenehan, and McIntyre—were affected by Respondent's questionable policy before it was discontinued. Thus, when the remaining 11 alleged discriminatees submitted applications, they were not required to disclose their union affiliation as the policy by that time had been discontinued. Accordingly, the drawing of any inference with respect to these individuals would be wholly illogical and improper.

One other applicant, Donald Bubenheimer, who filled out an application on the same day as Schraeder, Kenehan, and McIntyre, and who revealed his union affiliation in compliance with Respondent's policy, was hired by Respondent.[25] This fact, however, along with the fact that Schraeder, Kenehan, and McIntyre also revealed their union affiliation and were not hired, is of no consequence, for to be relevant there must be some evidence to link Mellow, who was solely responsible for the hiring, to the applications of Schraeder, Kenehan, and McIntyre. Such evidence is nonexistent for, as stated, Mellow did not review any of the applications, including Bubenheimer's. Lacking such evidence, I find no basis for inferring that Mellow utilized knowledge obtained from the union disclosure form signed by Schraeder, Kenehan, and McIntyre as a basis to deny them, or consider them for, employment.

Finally, I find credible and plausible Respondent's assertion, as testified to by Mellow and Kresge, that Mellow filled all positions with persons who either had previously worked for him, had expressed an interest in working for him, or had been recommended to him, without considering any of the applications received in response to the want ads placed in the Scranton Tribune Times newspaper.[26] Mellow's testimony in this regard was corroborated by Kresge who credibly and without contradiction testified that she knew "for a fact that [some of the people hired by Mellow] were employed there before." The General Counsel correctly points out that in response to its subpoena, it received copies of only six of the applications filed by the 13 individuals who were eventually hired, and that four of the six applications do not reflect that the named individuals previously worked, or had previously applied to work for the Respondent. The fact that only six applications were received in response to the subpoena is no great mystery, for as credibly testified to by Kresge, many of the files kept on employees "just contain timecards" and full applications were not retained for some of the individuals hired. Her testimony in this regard is consistent with Mellow's testimony that he hired individuals without first obtaining applications.[27] Further, while the applications submitted by Bubenheimer, Arbucco, Ceccaroni, and Sterowski indicate that they may not have previously worked or applied for work with Respondent, they could have obtained employment pursuant to a recommendation. Indeed, the record evidence clearly establishes that Bubenheimer obtained employment with Respondent through a referral from a fellow contractor. Although no similar evidence was produced with respect to how Arbucco, Ceccaroni, and Sterowski, came to be employed, I accept Respondent's assertion that all 13 applicants were hired either because they previously worked for Respon-

[25] As the General Counsel correctly points out, Bubenheimer was apparently hired by Mellow based on a recommendation from a fellow general contractor. Mellow states that he learned of Bubenheimer's union affiliation from Bubenheimer himself.

[26] The General Counsel suggests that Kresge's testimony that she was informed by Mellow that he had hired individuals who previously worked for him or had expressed interest in doing so, as well as individuals who were recommended by others, was hearsay, and a ruling on his objection to such testimony was deferred and not ruled on by me. He argues that I should sustain his objection and reject such testimony. I disagree. The General Counsel's objection was properly denied. (Tr. 325–326.) The General Counsel suggests that Kresge provided such testimony only after Mellow's testimony proved to be inadequate. He ignores the fact, however, that Kresge, like all other witnesses in this matter, was sequestered and had no knowledge of what Mellow may or may not have testified to. Further, Mellow was a key witness in this proceeding, and was questioned extensively by the General Counsel. The latter's failure to elicit the responses he was seeking on this particular issue was not the product of any recalcitrance or reluctance on Mellow's part to properly answer questions put to him, but rather resulted from a failure on the General Counsel's part to fully pursue this line of questioning. Thus, Kresge's testimony as to what Mellow, who testified at the hearing and was a party to this proceeding, may have said to her is not hearsay and was properly admitted.

[27] The General Counsel does not allege that the Respondent failed to fully comply with his subpoena requests or that it deliberately withheld information.

dent, had previously expressed an interest in doing so, or had been referred by others for employment. In any event, as the General Counsel has not made out a prima facie showing that Respondent was motivated by antiunion considerations in its hiring practices, the Respondent was under no obligation to prove the legitimacy of its hiring practices.

3. The 8(a)(5) allegations

The unilateral wage increase

It is not disputed that on July 19 Respondent unilaterally granted unit employees a wage increase. The Respondent contends that the increase was consistent with a written policy, enacted July 29, 1993, and put into effect on January 1, 1994, establishing July 19 as the anniversary date for all future employee wage increases. (See G.C. Exh. 18, p. 5.) It contends that the increase did not have an antiunion purpose or effect, and that it was caught in a "damned if you do, damned if you don't situation" because had it withheld the increase, it would have been subject to an unfair labor practice charge for failing to follow its established policy or practice.

The General Counsel points out that Respondent, having recognized the Union pursuant to the settlement agreement as its employees' exclusive bargaining representative, was duty bound to bargain with the Union regarding the wage increase, and that its unilateral decision to grant the July 1994 increase amounted to a breach of its bargaining obligation and a breach of the settlement agreement.[28] I agree with the General Counsel.

Regarding unilateral wage increases, or other changes made during the course of negotiations, the Board in *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), stated that:

> An employer violates his duty to bargain if, when negotiations are sought or are in progress, he unilaterally institutes changes in existing terms and conditions of employment. On the other hand, after bargaining to an impasse, that is, after good-faith negotiations have exhausted the prospects of concluding an agreement, an employer does not violate the Act by making unilateral changes that are reasonably comprehended within his preimpasse proposals.

The Respondent does not justify its actions on the basis of any impasse in negotiations or waiver by the Union. Rather, it contends that it was compelled to grant the increase given the policy it announced a year earlier and put into effect in January 1994, that it would henceforth grant wage increases on July 19 of every year. Essentially, the Respondent argues that it was caught between the proverbial "rock and a hard place" because had it not granted the increase, it could have been accused of refusing to abide by its announced policy. It argues implicitly that its conduct in this regard was undertaken in good faith and should be found not to have been unlawful. Unfortunately for the Respondent, its good faith is not enough to absolve it from liability under the Act, for a unilateral change by an employer during the course of a collective-bargaining relationship regarding a mandatory subject of bargaining, such as a wage increase, is normally regarded as a per se refusal to bargain. See *NLRB v. Katz*, 369 U.S. (1962).[29] Indeed, in *NLRB v. Katz*, supra, a violation was found notwithstanding that no evidence of bad faith was shown and where the evidence indeed suggested that the employer acted in good faith. Here, the Respondent, regardless of its good-faith intentions, violated Section 8(a)(5) and (1) when it unilaterally implemented its July 1994 wage increase without notifying and affording the Union an opportunity to bargain over said increase.[30]

4. The refusal to furnish information

It is alleged that Respondent since on or about August 5, has failed and refused to furnish the Union with the addresses and rates of pay of unit employees. The record evidence establishes that on August 5, the Union wrote to Respondent requesting that it provide the Union with "a current employee list, which includes names addresses, current rates of pay, benefits, and dates of hire for each of your employees" so that it could properly represent its employees during the bargaining process. The letter requested that Respondent contact the Union if the information could not be provided within 10 days. (See G.C. Exh. 17.) On August 26, the Respondent furnished the Union with a list of employees, their dates of hire, a general list of wage rates, and a digest of benefits. It did not, as requested in the Union's August 5 letter, furnish employee addresses claiming that it wished to "protect the privacy of employees." Instead, it suggested that if the Union wished to correspond with unit employees, it send all such correspondence in care of Respondent at its business address. (G.C. Exh. 18.)

The Respondent argues that it has fully complied with the Union's information request, and that it should not be deemed to have violated the Act simply because some of the information provided, e.g., wage scales, was not in the form desired by the Union or because it sought to protect the privacy rights of employees by withholding the employees' addresses. The General Counsel concedes that Respondent provided some of the information sought in the August 5 letter. It contends, however, that Respondent nevertheless violated Section 8(a)(5) and (1) by refusing to furnish the Union with employee addresses and with the pay rate of each individual unit employee. I agree with General Counsel.

It is well settled that once a bargaining obligation is created, as it was in this case pursuant to the settlement agreement of May 24, an employer becomes statutorily obligated to provide the bargaining representative with information that is both relevant and necessary for the proper performance of its duties. *Pfizer, Inc*., 268 NLRB 916, 918 (1984). The Board has found that addresses and wage rates of individual unit employees are presumptively relevant and must be produced. *Circuit-Wise*, 308 NLRB 1091, 1097 (1992); and *Top Job Bldg. Maintenance Co*., 304 NLRB 902, 909 (1991).

The Respondent does not question the relevancy of the information that was not provided; namely, the individual wage rate and address of each unit employee. Rather, its failure to furnish the Union with the pay rate for each unit employee was premised on what I find to have been a good faith, but mistaken

[28] The General Counsel has not requested that the settlement agreement be set aside.

[29] See 2 Morris, *Developing Labor Law* 563 (2d ed. 1983).

[30] Although par. 8 of the complaint alleges that the Respondent's announced policy of July 29, 1993, was unlawful, that allegation was withdrawn following reinstatement of the settlement agreement, and while the agreement prohibited Respondent from making unilateral changes in the employees' terms and condition of employment, there is nothing in the agreement that expressly required the Respondent to rescind its July 29, 1993 policy. In the absence of such a directive, the Respondent arguably could have believed that its policy remained in effect and that it was obligated pursuant thereto to grant the increase.

belief that it had complied with the request by providing the Union with a general list of its wage rates, without pegging it to the individual unit employee. Notwithstanding Respondent's good faith, it is sufficiently clear from its August 5 request, that the Union was seeking the wage rate for each individual unit employee, rather than a general list of wage rates, and Respondent's submission of the latter, without identifying what each unit employee was earning, obviously fell short of the Union's request.

As to the employee addresses, the Respondent defends its refusal to provide such information to the Union on grounds that it was only interested in protecting the privacy rights of said employees. While the Respondent may have had good intentions, its failure to comply with this request, information which as noted is considered to be presumptively relevant, was nevertheless unlawful. As the Board has noted, whenever a claim of confidentiality is raised, the party asserting that claim has the burden of proof. *Pfizer, Inc*., supra at 919. Except for a general claim that it was interested in protecting the privacy rights of employees, the Respondent failed to show that its employees had expressed a desire to have such information kept confidential or that it had, in the ordinary course of business, kept such information confidential for other purposes. In these circumstances, Respondent's failure to provide the Union with the addresses and wage rates of unit employees, regardless of how pure its motives, violated Section 8(a)(5) and (1) of the Act, as alleged. The fact that Respondent may have partially complied with the Union's information request does not absolve it of liability stemming from its failure to provide the Union with remaining necessary and relevant information it had requested and to which it was clearly entitled. *Top Job Bldg. Maintenance*, supra. Its conduct in this regard, however, convinces me that the Respondent did not intentionally seek to avoid its bargaining obligations, and that its refusal to comply fully with the Union's request was based on a good-faith, albeit erroneous belief that it did not have to do so, rather than on any perceived animosity towards the Union.

5. The alleged refusal to bargain

The General Counsel contends that the Respondent's conduct both at and away from the bargaining table establishes clearly that the Respondent had no intentions of entering into any agreement with the Union and that it simply engaged in bad-faith surface bargaining in violation of Section 8(a)(5) and (1) of the Act.

The resolution of surface bargaining allegations never presents an easy issue. Indeed, the determination whether a party has engaged in unlawful "surface" bargaining is usually a difficult one because it involves, at bottom, a question of the intent of the party in question, and usually such intent can only be inferred from the totality of the challenged party's conduct both at and away from the bargaining table. *Lucky 7 Limousine*, 312 NLRB 770, 789 (1993); and *Overnite Transportation Co*., 296 NLRB 669, 671 (1989).

In support of the bad-faith, surface bargaining allegation, the General Counsel cites the "paper war" and other related statements purportedly made by Dembeski to Burdick on May 20, as well as Katz' claim that he was told by Koff during the June 14 conversation that Mellow was opposed to signing any agreement. Undoubtedly, such statements, if made, would constitute strong prima facie evidence of Respondent's early intentions not to bargain in good faith and would support a surface bargaining allegation. However, as noted, Burdick and Katz were not credible witnesses and I am convinced, based on the Burdick's and Katz' poor demeanor on the witness stand and inconsistencies in their testimony, that neither Dembeski nor Koff made the statements attributed to them.

The General Counsel further cites as evidence of Respondent's bad faith its alleged refusal to meet for an August 25 bargaining session. Katz claims that several days after August 5, he called Koff's office to arrange for a bargaining session. As Koff was out of town on business, Katz claims he spoke with someone identifying herself as Koff's secretary who committed Koff and the Respondent to an August 25 bargaining date. Koff denies that any such meeting was agreed to, and credibly testified that all of his appointments and meetings are scheduled by him and no one else.

As between Koff and Katz, I credit Koff that no such meeting was scheduled. Katz, as previously noted, was not a credible witness. His testimony that the parties agreed to an August 25 bargaining session was based on nothing more than his own recollection, and certain self-serving letters he sent to Koff, and is simply not believable. Thus, his suggestion that Koff's secretary was able to commit both Koff and the Respondent to an August 25 bargaining session, without first consulting with either Koff or any of Respondent's representatives, e.g., Mellow or Dembeski, as to their availability, strains credulity. Further casting doubt on Katz' testimony in this regard is the fact that unlike the July 5 and October 3 bargaining dates, which Katz admits were confirmed in writing, no such written confirmation was produced by Katz regarding an August 25 meeting.[31] At times during his testimony, Katz volunteered information that was not being elicited. For example, when asked by the General Counsel if he recalled who was to contact whom after the October 3 meeting, Katz stated he could not recall, but added, somewhat gratuitously, that "Flanagan had tried, and tried, and tried . . . and couldn't really do anything with him afterwards." At times during his cross-examination, Katz seemed anxious to portray himself as someone who had assumed the higher moral ground in this proceeding, as evident by his following statement: "In this case it's clear to me and to any attorney involved I this case that [the Union] is right morally and legally and Mr. Mellow is a game-playing violator of the law in many way some of which are being barred here."

The General Counsel sought to bolster Katz' testimony regarding an August 25 meeting by producing several letters exchanged between Koff and Katz that make reference to such a meeting. (G.C. Exhs. 24, 25, 27–29.) Those letters, however, do not establish that such a meeting had been arranged. On the contrary, the letters reveal a disagreement between Katz and Koff regarding such agreement, and serve neither to bolster nor corroborate Katz' claim of an agreed-upon August 25 meeting. In fact, Katz' letters, particularly the ones dated August 31 and September 27 (G.C. Exhs. 27, 29), are clearly self-serving in

[31] Katz brought with him to the hearing his "communication file" which he claimed contained "whatever communications I sent or didn't send." From the file, Katz was able to produce confirmation letters he sent regarding the July 5 and October 3 bargaining dates. When asked if he had a similar confirmation letter as to the August 25 meeting, he stated, "I do not see one in my communication file. That does not mean I do or don't have one." Katz' ambiguous testimony as to the existence of such a letter, and his failure to produce a letter confirming an August 25 meeting, while producing such letters for the July 5 and October 3 meetings, convinces me that no such letter exists and that no August 25 meeting was scheduled.

nature and appear to have been prepared by Katz for the purpose of creating a paper trail of evidence to be used, if the need arose, to support a bad-faith bargaining allegation.

The General Counsel also cites as evidence of Respondent's "unwillingness to return to the business of negotiating an agreement" Koff's alleged refusal in his August 24 letter to provide Katz with alternative bargaining dates, as requested by Katz in his August 18 letter. However, when read in conjunction with Katz' August 18 letter, Koff's response is subject to a more reasonable and certainly less sinister explanation than that proffered by the General Counsel. In his August 18 letter, Katz, inter alia, asked Koff to provide him with Respondent's counterproposal to the Union's initial contract offer. Along with his August 24 response, Koff sent Katz Respondent's counterproposal and suggests that Katz call him to arrange for a mutually acceptable date when he Katz would be available to meet and talk about collective-bargaining issues. Clearly, Koff's conduct in immediately forwarding to Katz a counterproposal, as requested by the latter, is hardly consistent with any plan or design by the Respondent to avoid its bargaining obligation, as argued by the General Counsel.

Admittedly, Koff did not furnish Katz with alternative bargaining dates as requested in the latter's August 18 letter. It is equally true, however, that Katz himself made no mention of his own availability for further negotiations, nor did he propose alternative dates of his own on which bargaining might resume. I note further that Katz' statement in his August 18 letter, that "as soon as we have received your position, we will be able to finish our evaluation of that which will be required from your client in order to conclude the labor contract," could reasonably have led Koff to assume that the Union would need some time to review Respondent's counterproposal before deciding on a response. Not knowing when the Union might be ready or willing to discuss Respondent's counterproposal, Koff's reluctance to furnish Katz with specific dates regarding his availability, and his alternative suggestion that Katz call him to "arrange for a mutually agreeable date" when he (Katz) would be "available to meet and talk about collective bargaining issues," can reasonably be viewed as nothing more than a good-faith effort by Koff to provide the Union ample time to review Respondent's proposal. Thus, contrary to the General Counsel, I find nothing in Koff's reply to Katz than demonstrates an unwillingness by the Respondent to engage in good-faith negotiations or that can be construed as a refusal to bargain.

The General Counsel further cites as evidence of Respondent's bad faith Mellow's alleged refusal to respond to Flanagan's phone requests to meet with him to discuss an agreement. Flanagan, as noted, testified that following the July 5 bargaining session, and again after the October 3 session, he tried repeatedly, albeit unsuccessfully, to meet with Mellow, with the latter either refusing to return his calls, or refusing to set up a particular meeting date on those occasions when they did speak.

While undisputed in most respects, Flanagan's testimony, like that of Schraeder and Katz, was not very convincing. Flanagan's testimony on certain points is in conflict with that provided by Schraeder, and while Schraeder was generally not a credible witness, the inconsistencies between his testimony and Flanagan's casts a shadow over Flanagan's testimony as well. For example, in an effort to corroborate Flanagan's testimony regarding the latter's attempts to arrange for a post-October 3 meeting with Mellow, Schraeder stated that he was present during many of the calls Flanagan made to Mellow, and that despite these frequent contacts, Flanagan and Mellow were unable to arrange for a date that would be agreeable to both. Schraeder also stated that many of these discussions occurred between October 31, 1994, and January 12, 1995, at which time Schraeder wrote to Respondent seeking a resumption of bargaining. Oddly enough, Flanagan makes no mention in his testimony of Schraeder having been present during any of the alleged phone calls made to Respondent, or during any of the purported conversations he may have had with Mellow. Schraeder's further assertion that Flanagan held additional discussions with Mellow after October 31, is contradicted by Flanagan who testified that after October 31, no further contact was had with Respondent until Schraeder's January 12, 1995 letter.

Finally, both Schraeder and Flanagan testified to having had separate conversations with Mellow during which the latter gave different accounts about the state of his business. Thus, Schraeder testified that Mellow advised him during a brief encounter on October 31, that he Mellow was not very busy, referring to the amount of work that he had available. Flanagan, on the other hand, testified that during his alleged conversations with Mellow in October, Mellow often claimed to be very busy. Assuming, arguendo, that Mellow did in fact converse with both Schraeder and Flanagan during late October, I find it highly unlikely that Mellow would have made conflicting statements to Schraeder and Flanagan regarding the state of his business. Rather, I find it more likely than not that either Schraeder or Flanagan, or both, embellished their account of what Mellow might have said so as to create an impression that Mellow either had no basis for refusing to meet because, according to Schraeder's account he was not very busy, or sought to avoid his bargaining obligation under the guise of being too busy, as implicitly suggested by Flanagan. While it is conceivable that Mellow might have said one thing to Schraeder and quite another to Flanagan, I find it highly unlikely that Mellow, who was generally a very credible witness, would have made such patently conflicting statements to Schraeder and Flanagan.

Overall, I find Flanagan's testimony to be suspect, including his claim that he made numerous attempts following the October 3 meeting to meet with Mellow.[32] Further, as found above, the Union, having received Respondent's counteroffer and having been advised by Koff that article 18 was being withdrawn, was expected to respond to the Respondent's last proposal. In this regard, I do not accept Flanagan's testimony that Mellow had agreed to contact him following the October 3 meeting as it runs counter to Koff's claim, which I credit and accept as true, that the Union was to contact Respondent regarding a response to the latter's counterproposal.[33] As I do not

[32] Mellow admitted having spoken with Flanagan at the October 3 meeting during which Flanagan told him he would do whatever it took to get a contract signed and would, if necessary, go over the contract line by line with Mellow. Flanagan's testimony is credited only to the extent it agrees with Mellow's or that of other Respondent witnesses.

[33] As Schraeder and Katz are found not to be credible, the General Counsel's intimation that they corroborate Flanagan's testimony in this regard is rejected. Katz' testimony, in any event, was in no way supportive of Flanagan's above testimony. In fact, Katz initially stated that it was Flanagan who was to contact Mellow. However, he subsequently changed his testimony in response to a leading question from the General Counsel, and ultimately admitted he could not recall "who was to contact whom." (Tr. 187.) The General Counsel further sought to corroborate the Union's claim in this regard through notes taken by

credit Flanagan's above testimony, the General Counsel's claim that Respondent refused to meet is without merit.

The Union, in its posthearing brief, also makes certain arguments regarding what it views as the Respondent's bad-faith approach towards negotiations. It contends, for example, that Respondent's bad faith is evident from the fact that Mellow did not attend the first bargaining session on July 5, and instead sent Koff and Dembeski who purportedly indicated at the July 5 session that they lacked any real authority to negotiate or enter into agreement with the Union.[34] As previously found, neither Katz nor Schraeder were credible witnesses, and their testimony regarding what Koff may have said regarding his bargaining authority is not accepted as true. Mellow and Koff, on the other hand, credibly testified that Koff had full authority to bind the Respondent during negotiations. Further, the fact that Mellow, rather than Koff, had the final authority to approve any agreement does not establish bad faith, for the Board does not require that a representative be so empowered but instead expects that any such limitation not serve as an impediment to the progress of negotiations. *Carpenters Local 1780*, 244 NLRB 277, 281 (1979).

As noted above, the parties engaged in extensive discussions during the first session regarding the Respondent's particular needs, and the types of agreements the Union had with other local employers. Mellow's absence or presence at that session was not crucial to the success of those initial discussions. Indeed, except for Katz' and Schraeder's discredited assertion as to Koff's purported lack of bargaining authority, there is nothing in the record to suggest that the July 5 discussions were in any way hampered by the fact that Mellow retained final authority over any agreement that might be reached. Schraeder's and Flanagan's description of the meeting as a "positive" one, and their view that the meeting ended on a "positive" note (Tr. 62; 113; 225), strongly suggests that the parties had engaged in a productive and meaningful dialogue of the issues. While the parties were not able to reach agreement that day, the Union nevertheless remained satisfied with the results of that first bargaining session.[35]

Nor do I view Koff's decision to consult with Mellow regarding the "residential-type" agreement proposed by the Union as evidence that Koff lacked bargaining authority or of bad-faith bargaining, as has been suggested by the Union, for the mere fact that an agent confers with his principal about matters raised in a bargaining session with which he may not be wholly conversant does not necessarily constitute evidence of bad faith. *Arcadia Foods*, 254 NLRB 1012, 1020 (1981). Here, neither Koff nor Dembeski was familiar with the Union's proposed standard agreement, and their suggestion that they wanted to discuss it first with Mellow, who apparently was also unfamiliar with said agreement, was not unreasonable. Indeed, Koff's further suggestion that the "residential type" agreement was something that could be molded into an agreement after it was discussed with Mellow clearly indicates Koff's willingness to engage in further negotiations and his anticipation that the parties would be able to reach agreement.

The Union also argues that the Respondent's proposal to include a "double breasting" provision in any agreed-upon contract, which it claims would effectively give Respondent the unilateral right to change certain working conditions without notice to the Union, when viewed in light of Respondent's other conduct, such as Mellow's failure to meet with Flanagan, Dembeski's alleged "paper war" statements to Burdick, its refusal to comply with an information request, and its unilateral granting of a wage increase, serves as further evidence that Respondent had no real desire of reaching agreement with the Union and was engaging in surface bargaining.

In matters such as this, the Board's role is not to sit in judgment of the substantive terms of bargaining, but rather to oversee the process to ascertain that the parties are making a sincere effort to reach agreement. *McClatchy Newspapers*, 307 NLRB 773, 779 (1992). The Board therefore will not consider whether a particular proposal is "acceptable" or "unacceptable" to a party in deciding the question of bad faith, but will instead examine proposals when appropriate and consider whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining contract. *Reichhold Chemicals*, 288 NLRB 69 (1988).

As an initial matter, and without regard to whether the provision in question here—article 18—is a reasonable one, it should be noted that the Board has long accepted the concept of "double breasting" as a lawful arrangement for employers, primarily in the construction industry, to create a separate and distinct nonunion operations. *Carpenters Ohio (Alessio Constr.)*, 310 NLRB 1023 (1993). To the extent that the Board sanctions such an arrangement, it can hardly be deemed unlawful or improper for an employer to propose such a provision for inclusion in a contract during negotiations, as the Respondent did in this case when it included article 18 as part of its counterproposal. While the Union undoubtedly finds this provision objectionable, that fact alone is insufficient to render the proposal unreasonable, and cannot, without more, support a finding under *Reichhold Chemicals*, supra, that the Respondent proffered article 18 for the purpose of stifling or hindering the bargaining process. Indeed, the Respondent's conduct in removing article 18 from the bargaining table during the October 3 bargaining session, soon after the Union expressed objections to the provision, is hardly consistent with a plan or design by Respondent to thwart or hinder the bargaining process.

Finally, while Respondent, as found above, unlawfully granted employees a wage increase and failed to fully comply with the Union's information request, its conduct in this regard, as found above, resulted from a good-faith belief that it was acting in a proper manner and was not, in my opinion, the product of any grand design or deliberate scheme by the Respondent to delay or avoid its bargaining obligation or to some-

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Schraeder. Those notes, however, are nothing more than a brief, self-serving summary of Schraeder's view of what occurred and do not, in my view, accurately reflect all that was discussed at the meeting.

[34] Katz' testimony as to what Koff said regarding his bargaining authority differs significantly from Schraeder's. Katz testified, for example, that either Dembeski and/or Koff "stated they could not make any substantive decisions, that they would have to get back to me because all decisions were really made and arrogated to himself in the sole and complete and exclusive power of Mr. Mellow." Schraeder, however, testified that following discussions by the parties he was of the opinion that the parties could come to some type of agreement and wanted to discuss the matter further. Katz, at that point, asked, "Just who is the owner of the corporation?" After being advised that it was Mellow, Katz commented, "Well, how can we have an appropriate meeting here if the owner isn't here to make a decision on even signing? We can't even gain anything at this meeting other than an exchange of ideas." According to Schraeder, either Dembeski or Koff responded that Mellow "makes all the decisions." (Tr. 61.)

[35] Unlike Flanagan and Schraeder, Katz testified that the July 5 meeting ended on a downward note.

how undermine the Union in any way. Thus, there is no question that it engaged in serious negotiations during the July 5 and October 3 bargaining sessions, and that it submitted a counterproposal of its own in response to the Union's proposed agreement which, except for the "double-breasting" provision, was not contested. The Respondent's good faith was further manifested in it willingness to withdraw article 18 from its counterproposal. As noted, there is no indication that the Union objected to any other aspect of Respondent's counterproposal. By the same token, no evidence was presented to show that the Union, blinded by its opposition to article 18, discussed other provisions in the counterproposal. In fact, when the record is viewed in its totality, it becomes fairly evident that the Union's frustration with the Respondent during this whole process resulted from its inability to reach a quick agreement. Thus, Koff credibly testified that Katz told him during prenegotiation discussions that he expected an agreement to be reached within 10 minutes. During negotiations, Katz further commented that he had revised his schedule because he anticipated that an agreement would be signed during the first session. The fact that Respondent chose to be more deliberate and cautious in its approach towards the bargaining process does not amount to dilatory and evasive tactics or constitute bad-faith bargaining. Accordingly, I find that a preponderance of the relevant and credible evidence fails to establish that Respondent engaged in bad-faith, surface bargaining, and that Respondent in this regard did not violate Section 8(a)(5) and (1) of the Act, as alleged.

CONCLUSIONS OF LAW

1. The Respondent, Richard Mellow Electrical Contractors Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Electrical Workers, Local 81 is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to provide the Union with the addresses and wage rates of employees in the following appropriate bargaining unit, the Respondent has violated Section 8(a)(1) and (5) of the Act:

> All full-time and regular part-time electricians employed by Richard Mellow Electrical Contractors Corporation, excluding all other employees, estimators, office clerical employees, guards, and supervisors as defined in the Act.

4. By unilaterally granting a wage increase to unit employees on July 19, 1994, the Respondent has violated Section 8(a)(1) and (5) of the Act.

5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent has not engaged in any of the other unlawful conduct alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent shall be ordered to furnish the Union the address and rate of pay for each unit employee. However, while the Respondent is found to have unlawfully granted unit employees a wage increase, nothing here shall be construed as authorizing the Respondent to rescind such increases.

[Recommended Order omitted from publication.]